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MILITARY LAW REVIEW

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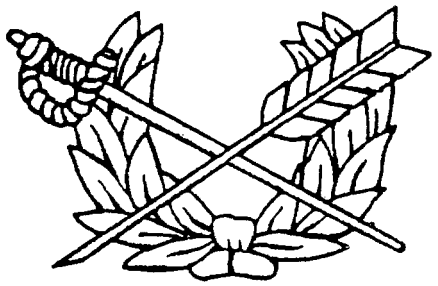

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The Third Legal Assistance Symposium

Articles for the Legal Assistance Practitioner

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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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MILITARY LAW REVIEW

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INTRODUCTION TO THE THIRD LEGAL ASSISTANCE SYMPOSIUM

by Brigadier General Thomas R. Cuthbert

As this Third Legal Assistance Symposium goes to print, we find ourselves celebrating the overwhelming success of Operation Desert Storm. Dedication of this issue of the *Military Law Review* to legal assistance is indeed appropriate, considering the significant role legal assistance played in the largest peacetime deployment of United States military might in the history of our nation. Army leaders and soldiers throughout the world relied on us to meet the legal challenges created by the mobilization and deployment of our soldiers. Lawyers labored to prepare wills and powers of attorneys, answer numerous questions on domestic relations matters, help soldiers receive the protection offered by the Soldiers' and Sailors' Civil Relief Act (SSCRA), and provide a myriad of other legal services. This effort continues unabated during the redeployment and demobilizing phase of Desert Storm. Because legal assistance plays such a significant role in the overall delivery of legal services to our commands, our soldiers, and military family members, a review of where we have been, what we are doing, and what we plan on accomplishing is appropriate.

Where we have been: Over the course of the last thirty years or so, we have seen a tremendous growth in the variety of legal services provided by attorneys of the Judge Advocate General's Corps (JAGC). We are practicing in many new and exciting areas of the law that have evolved in our lifetime, including environmental law, procurement fraud, and contract appeals. We have seen the creation of a separate judiciary and a separate Trial Defense Service. This same expansion has occurred in the fields that traditionally have been the "bread and butter" of military lawyers—military justice, international law, and administrative law. What we often fail to note, however, is the expansion and development of legal assistance within the United States Army. Although legal assistance originally began as an extra duty for attorneys to help soldiers confronted by legal entanglements in the civilian arena, it became a full-time duty during the Vietnam war. As legal offices expanded to fulfill their military justice obligations brought about by the war, legal assistance became a separate section of the staff judge advocate (SJA) office. More and more officers were tasked with legal assistance duties, and it was not long before the designation of defense counselilegal assistance

attorney became an accepted rotational duty within the SJA office. At the end of the Vietnam War, the Army was reduced in size. Nevertheless, the legal assistance officer remained a viable part of the SJA office. As a result of a tremendous increase in the number of requests for information from the field, legal assistance received increased attention at Department of the Army (DA) level and at The Judge Advocate General's School (TJAGSA) in Charlottesville. TJAGSA began offering legal assistance courses, a legal assistance division was established in the Office of The Judge Advocate General (OTJAG), and a separate branch was established for legal assistance in the Administrative and Civil Law Division at TJAGSA. Articles dealing with legal assistance issues became more prominent in *The* Army *Lawyer;* Army Regulation 27-3 was written for legal assistance; and a conscious effort was made by The Judge Advocate General to promote legal assistance efforts within the Army. By the mid-1980's, Congress recognized legal assistance by passing 10 U.S.C. section 1044, which authorized legal assistance for military members, their families, and retired personnel, subject to the availability of legal staff resources. Legal assistance was recognized as an integral part of legal services offered by the Judge Advocate General's Corps.

Where we are: Legal assistance is in fantastic shape. Our clients are receiving the best legal assistance ever, and our services continue to improve. The events of the last several months have underscored the need for dynamic, comprehensive legal assistance. Although active duty assets were stretched to their limits by the mission of preparing our soldiers for deployment to Southwest Asia, our Reserve assets were called upon and performed in a magnificent manner. We are working hard preparing for the redeployment of troops and the demobilization of Army Reserve and National Guard personnel. The anticipated legal effort directly attributable to this heretofore unprecedented peacetime rapid call-up of Reserves is substantial. Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights Law (VRRL) problems are just the tip of the iceberg. War brings domestic relations problems as well, and these also must be addressed. Fortunately, innovation has been the watchword in legal assistance. Currently, legal assistance offices nationwide are participating in monthly video teleconferences that are initiated at DA level. An advanced computer software legal assistance package is in use around the world, which provides rapid and flexible wills and powers of attorney necessary for deployment situations as well as more comprehensive will packages for nondeployment circumstances. The Army Legal Assistance Office, OTJAG, has produced videotape programs that have been distributed throughout the Army during Operations Desert Shield and Desert Storm. Two legal assistance courses

are taught at TJAGSA each year, and an annual legal assistance course is taught in Germany. The Army Legal Assistance Office sends two tax instructors overseas each January to conduct tax courses in Germany and in Korea. Legal assistance is now one of the competitive categories in the Army Communities of Excellence award program. The Chief of Staff Legal Assistance Award is the centerpiece to recognition of the highest quality legal assistance offices in the Army today. These activities, in addition to establishing the United States Army as the leader in military legal assistance services, continue to demonstrate the Corps' desire for progressive and innovative methods to serve our soldiers and their families. Precisely because of these outstanding examples of excellence, the 1990 Army Family Action Plan Planning Conference voted legal assistance as one of the five most valuable services in the Force Support category.

Where we are going: Legal assistance will continue to play an important role among the services provided by the Judge Advocate General's Corps to the Army of the future. We know that change is inevitable and that the Army is in the process of the biggest restructuring since the Vietnam War. We must not become complacent or disheartened. We should look upon change as a challenge and an opportunity to excel. These words often are used and discounted, but I implore you to heed them. The JAG Corps generally, and legal assistance attorneys specifically, always have faced intimidating tasks and found ways to accomplish the mission. Ingenuity and innovation provide numerous opportunities. We always are looking for better and more efficient ways of doing our job, and this must continue. Abundant avenues exist to share our experiences and ideas— articles in *The A m y Lawyer* and the *Military Law Review,* presentations through video teleconferences and legal assistance courses, videotape presentations through the efforts of TJAGSA and Army Legal Assistance, and fact sheets or handouts sent to other offices. I encourage you to share your discoveries—we must learn from the past, incorporate the lessons learned from the deployment to Southwest Asia, and continue to improve the way we do business. Legal assistance has proven itself to be a necessity for the maintenance of readiness and the morale of our soldiers. The requirement for top quality legal assistance is here to stay, and our duty is to see that we continue to improve on the outstanding service that has become our trademark. Legal assistance attorneys must continue to "go the extra mile" for the client. Staff judge advocates must continue to place good people in legal assistance positions. They are our window to the world and the command. How they do their jobs and the impression they leave with their clients directly reflect upon the Corps as a whole. Keep up the great work!

ILLEGITIMATE CHILDREN AND MILITARY BENEFITS

by Major David B. Howlett*

I. INTRODUCTION

This article examines the constitutionality of military benefit statutes and regulations as they relate to illegitimate children. A child is legitimate if he or she is born or conceived in wedlock, or if the child's mother was married during pregnancy! Throughout history,[2] societies have subjected illegitimate (or ''nonmarital")children to a variety of disabilities.[3] In English common law, the illegitimate child was the child of nobody, or ***filius nullius.*** The child could not inherit; the parents had no right to custody; and the child could not assert any rights against either parent for support.[4]

Consistent with English common law, early American law considered the illegitimate child to have no family. Reform began in the late nineteenth century, but progressed at different rates in each state.[5]

Debates continue about the causes of illegitimacy. Researchers have proposed phenomena ranging from broken homes and bad neighborhoods to supposed psychological defects of the mothers.[6] Researchers have considered and rejected causes as diverse as relative wealth and comparative climate.[7] In some sense, illegitimacy has no specific cause, only effects. Its effects include higher mortality, lower IQ, and

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[1]J. Teichman, Illegitimacy: A Philosophical Examination 28 (1982).

[2]*See* Deuteronomy 23:3.

[3]*Id.* at 40, 53-54.

[4]W. Blackstone, Commentaries *459, 465-66.

[5]H. Krause, Illegitimacy: Law and Social Power 5, 9-58 (1982).

[6]*See, e.g.*, C. Vincent, Unmarried Mothers 17 (1963). Vincent's own theory is that illegitimacy and careless sex are the result of "fun morality" or "the philosophy of fun." ***Id.***

[7]*See* S. Hartley, Illegitimacy 70, 82 (1975).

psychological problems.[8] Its formal cause is the legal regime that generates the distinction between legitimate and illegitimate children. The immediate causes of nonmarital children "are almost as multifarious as human motives and loves and hates."[9]

Virtually all societies in the world today, whether primitive or modern, distinguish between illegitimate children and legitimate children and apply some disabilities or penalties to the former?"Rates of illegitimate birth vary from over 70% in Panama and Jamaica to less than 1% for Japan, Israel, Egypt, and Syria." The rate for the United States was less than 3% at the turn of the century. By 1960. it rose to 5% and reached 9.7%in 1968.[12] In the most recent figures, of 3,756,547children born in 1986, 878,477—or23.4%—were born to unmarried women.[13]

Illegitimacy rates among black Americans have been higher than the rates among white Americans since the early nineteenth century.[14] The discrepancy has been very large in recent decades. In the latest figures, 15.71% of white births, and 61.21% of black births are to unmarried mothers. Some scholars suggest this phenomena may have its roots in slavery?"

In illegitimacy. as in many other areas, the military reflects society as a whole. **A** recent study of Navy enlisted women found that forty-one percent of those who became pregnant during a recent tenmonth period were not married.[16] Most of the single pregnant women were young and in the lower enlisted ranks.[17] In the Army, 846 soldiers receive Basic Allowance for Quarters (BAQ) solely on the basis of court-ordered support for illegitimate children, and 3729 soldiers receive BAQ solely on the basis of voluntary support of illegitimate

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[8] *Id.* at 8-12.

[9] J. Teichman, *supra* note 1, at 22.

[10] S. Hartley, *supra* note 7, at 3.

[11] *Id.* at 24-25.

[12] *Id.* at 48-49.

[13] U.S. Dep't of Health and Human Services. 1.1 Vital Statistics of the United States 1986, table 1-31 (1988).

[14] Smith, *The Long Cycle in American Illegitimacy and Prenuptial Pregnancy*, in Bastardy and Its Comparative History 373-78 (1980).

[15] *See* Billingsley, *Illegitimacy and Patterns of Negro Family Life*, in The Unwed Mother 133-57 (1980).

[16] N.Y. Times, Feh. 2, 1988, at A17, col. 1. The study occurred at the San Diego Naval Hospital and covered the period July 1986 through May 1987. The Navy initially refused to release the results of the study. The figures may be skewed if women from elsewhere in the Pacific are sent to San Diego when they become pregnant

[17] *Id.*

children.[18] Most of these soldiers are from the lower enlisted ranks.[19] These figures exclude soldiers who support illegitimate children but draw BAQ on the basis of another dependent, such as a wife or parent.

11. THE SUPREME COURT'S ILLEGITIMACY ANALYSIS

The most significant changes in American law with respect to illegitimacy came about as the result of a series of Supreme Court cases. In over twenty major cases since 1968, the Court has considered claims of unconstitutional discrimination against illegitimate children or their parents. Over this period, the Court developed standards for measuring the legality of laws that differentiate on the basis of legitimacy.

The Court first struggled to formulate an appropriate level of review for statutes discriminating on the basis of legitimacy. In doing so, the Court had to consider the validity of various governmental goals put forward to justify differentiation between legitimate

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[18]Figures are from the United States Army Finance and Accounting Center, Joint Uniform Military Pay System-Army, Payment Statistics Report, November 1989.

[19]*Id.* The figures are as follows for November 1989:

Rank	# of soldiers w/ BAQ for court ordered support of illegitimate children	# of soldiers w/BAQ for voluntary support of illegitimate children
E-1	6	**45**
E-2	**49**	166
E-3	132	620
E-4	374	1734
E-5	178	708
E-6	67	277
E-7	**25**	92
E-8	2	**11**
E-9	0	**3**
Total	833	3655
WO's	1	8
O-1	1	14
O-2	**5**	22
O-3	**4**	26
O-4	1	2
O-5	1	1
0-6	0	1
Total	13	74

and illegitimate children. The Court also gave guidance concerning how statutes could be drafted to pass constitutional muster, yet still treat people differently on the basis of legitimacy. Finally, the decisions began to define the rights of unwed parents.

A. THE MAJOR ILLEGITIMACY CASES

In the earliest illegitimacy cases, the Supreme Court struck down laws that blatantly discriminated against illegitimate children. In 1968 the Court found the operation of the Louisiana wrongful death statute unconstitutional because it denied illegitimate children the right to recover for the deaths of their mothers, while it allowed legitimate children to do so.[20] In another case, the Court found the same statute unconstitutional because it prevented mothers from suing for the wrongful deaths of their illegitimate children.[21] The Court called the discrimination "invidious"[22] and irrational,[23] but did not provide an analytical framework for evaluation of statutory classifications involving illegitimacy.

In 1971, however, the Court in *Labine v. Vincent*[24] upheld a statute that denied intestate succession to an illegitimate daughter even though the father had legally acknowledged her. Noting the state's strong interest in regulating the disposition of property at death, the Court denied that "a state can never treat an illegitimate child differently from legitimate offspring."[25]

The Court's next illegitimacy case provided a basic analytical framework. In *Weber v. Aetna Casualty and Surety Co.*[26] the Court struck down a workmen's compensation statute that favored legitimate and acknowledged illegitimate children over unacknowledged illegitimate children. The *Weber* Court announced a dual inquiry for statutes using legitimacy classifications: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[27] The majority concluded that the classification involved "no legitimate state interest"[28]

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[20]Levy v. Louisiana, 391 U.S. 68 (1968).
[21]Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968).
[22]*Levy*, 391 U.S. at 72.
[23]*Glona*, 391 US. at 76.
[24]401 U.S. 532 (1971).
[25]*Id.* at 536.
[26]406 U.S. 164 (1972).
[27]*Id.* at 173.
[28]*Id.* at 176.

and should be struck down as denying equal protection to illegitimate children. Thus, if the state does not present a strong enough interest, the Court will not reach consideration of the importance of the personal rights involved.

The following year, the Court issued two per curium opinions on legitimacy. In *Gomez* v. *Perez*[29] the Court struck down a Texas law that granted legitimate children a judicially enforceable right to financial support from their fathers, but denied this right to illegitimate children. In the second case, the Court struck down a statute that had the effect of denying welfare benefits to illegitimate children.[30]

The Supreme Court first applied illegitimacy equal protection analysis to a federal statute in *Jimenez* v. *Weinberger*.[31] The Court considered the Social Security Act's blanket denial of disability benefits to illegitimate children born after the onset of the insured's disability and concluded that it was a denial of equal protection to those children. The Court held that complete exclusion of the class of illegitimate children was not reasonably related to the goal of avoiding spurious claims.[32]

Two years later, in *Muthews v. Lucas*,[33] the Court ruled against illegitimate children applying for Social Security benefits. The Social Security Act's death benefit scheme considered legitimate children and several categories of illegitimate children to be eligible, but denied benefits to illegitimate children not living with or supported by an insured father at the time of his death.[34] The statute did not give these children an opportunity to show independent evidence of their dependency if they fell outside the favored categories. Applying the *Weber* two-part test, the Court endorsed the governmental goal of avoiding "the burden and expense of specific case by case determination in the large number of cases where dependency is objectively probable."[35] The Court noted that the statute did not discriminate between illegitimates and legitimates with nothing more, but was "carefully tuned to alternative considerations."[36]

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[29]409 U.S. 535 (1973).
[30]New Jersey Welfare Rights **Org.** v. Cahill, 411 U.S. 619 (1973).
[31]417 U.S. 628 (1974).
[32]*Id.* at 633-34.
[33]427 U.S. 495 (1976).
[34]*See* 42 U.S.C. § 416(h)(2)(A), (h)(3) (1988). For a discussion of a recent class action suit involving § 416(h)(2)(A), see Rrady v. Sullivan, 893 F.2d 872, 874-76 (7th Cir. 1989).
[35]*Matthews*, 427 U.S. at 509.
[36]*Id.* at 513.

In *Trimble v. Gordon*,[37] the Court struck down the Illinois intestate succession law that allowed illegitimate children to inherit only from their mothers, while legitimate children could inherit from both parents. Although the state asserted an interest in the avoidance of spurious claims, the Court found that its scheme ignored "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[38] Explaining a contrary result with the very similar statute in *Labine*, the majority noted, "[I]t is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*."[39]

In the same year, in *Fiallo v. Bell*[40] the Court upheld the treatment of illegitimates in the Immigration and Naturalization Act of 1952.[41] The Act had the effect of excluding the relationship between an illegitimate child and its father from the preference normally given to the parents of children of United States citizens. In upholding the different treatment of illegitimates, the Court stated that the area of immigration is the responsibility of Congress and that it "is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[42]

In 1978 the Court continued the unpredictable trend of illegitimacy cases when it upheld the New York intestate succession statute, which required illegitimate children to obtain a judicial paternity order during their father's lifetime in order to inherit from him.[43] The Court found that the state's scheme bore an "evident and substantial relationship" to the important goal of mitigating serious difficulties in the administration of estates.[44] The statute placed problems of proof before a court when the putative father was in a position to respond. The Court distinguished the case from *Trimble* because the New York law did not present an insurmountable barrier to inheritance by illegitimate children; the father could waive

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[37] 430 U.S. 762 (1977).
[38] *Id.* at 770-71.
[39] *Id.* at 776 n.17.
[40] 430 U.S. 787 (1977).
[41] 8 U.S.C. § 1101(b) (1988).
[42] *Fiallo*, 430 U.S. at 799. Ultimately, in 1986, Congress acted to include natural fathers and illegitimate children in the immigration preference in cases when the father has or had a bona fide relationship with the child. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315, 100 Stat. 3359, 3439-40 (codified as amended at 8 U.S.C. § 1101(b)(1(D) (1988)).
[43] Lalli v. Lalli, 439 U.S. 259 (1978).
[44] *Id.* at 268-75.

his defenses in a paternity suit or even institute the proceeding himself.[45]

In a 1979 case, *Califano* v. *Boles*,[46] an unwed mother challenged the constitutionality of the Social Security Act,[47] which gives "mother's insurance benefits" only to widows and divorced wives of wage earners. In upholding the law, the Court said that it was rational for Congress to conclude that a woman never married to a man is far less likely to be dependent upon him at death.[48] The Court held that the legislation had only an incidental, speculative impact on illegitimate children and the effect on them did not warrant further inquiry.[49]

The following year, in *United States* v. *Clark*[50] the Court considered the treatment of illegitimate children in the Civil Service Retirement Act.[51] The Act provided survivors' annuities to all legitimate children, but gave the same benefits to illegitimate children only if they "lived with the employee. . .in a regular parent-child relationship."[52] The Civil Service Commission interpreted this to mean that the children would be eligible only if they lived in the same home as the employee at the time of his death.[53] The plaintiffs in the case had lived with the employee for several years and were continuously supported by him, but did not live with him at the time of his death. Declining to reach the constitutional issue, the Court construed that statute to allow payment of benefits as long as the children lived with the employee at some time during his life, not necessarily at the time of his death.

Throughout the rest of the 1980's, the Supreme Court decided a series of cases involving state statutes of limitations for paternity suits. Although the *Gomez v. Perez* decision had allowed illegitimate children to sue fathers for support, some states severely restricted their ability to do so through short statutes of limitations. In striking down the Texas one-year limit, Justice Rehnquist wrote that laws must allow a reasonable opportunity for illegitimate children to bring

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[45] *Id.* at 273. The Court noted that the daughter in *nimble* would have been a distributee of her father's estate if the New York statute had applied.
[46] 443 U.S. 282 (1979).
[47] 42 U.S.C. § 402(g)(1) (1988).
[48] *Califano*, 433 U.S. at 289.
[49] *Id.* at 294.
[50] 445 U.S. 23 (1980).
[51] 5 U.S.C. § 8341(a)(3)(A) (1988).
[52] *Id.*
[53] *Clark*, 445 U.S. at 24-25.

suit, despite a state interest in avoiding stale or fraudulent claims.[54] Tennessee's two-year limit[55] and Pennsylvania's six-year limit[56] met the same fate. In each case, the states allowed legitimate children to sue for paternal support throughout their minority. Ultimately, the federal Child Support Enforcement Amendments of 1984[57] required all states participating in the federal child support program to institute procedures to establish the paternity of any child under eighteen years old.

Paralleling the Court's consideration of the rights of illegitimate children was a series of cases involving claims by unwed fathers. The first of these cases, *Stanley v. Illinois*,[58] involved a state law that declared children of unwed fathers wards of the state without a hearing on the father's fitness as a parent. The Court held that the presumption of unfitness denied the fathers equal protection.[59] The Court's analysis, however, relied on the due process clause of the fourteenth amendment, recognizing the father's interest in the care, custody, and management of his children.[60]

In **1978** the Court rendered its first unanimous illegitimacy decision, upholding a Georgia ruling that prevented an unwed father from blocking the adoption of his child by the mother's new husband.[61] In view of the father's sporadic support of his child, the Court held that the state's goal of placing the child based on the child's best interests superseded the father's parental rights.

The Court decided in favor of an unwed father the following year in *Caban v. Mohammed*.[62] The Court found a denial of equal protection in the New York adoption law that required the permission of both parents for the adoption of legitimate children, but of only the mother for illegitimate children. The Court treated the statute's classifications as gender-based distinctions.[63] The Court stressed that its decision was limited to cases where the father had established a substantial relationship with the child.

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[54]Mills v. Habluetzel, 456 U.S. 91. 99 (1982).

[55]Pickett v. Brown, 462 U.S. 1 (1983).

[56]Clark v. Jeter, 486 U.S. 456 (1988).

[57]Pub. L. No. 98-378, § 3(b), 98 Stat. 1305. 1306-11 (codified as amended at 42 U.S.C. § 666 (1988)).

[58]405 U.S. 645 (1972).

[59]*Id.* at 658.

[60]*Id.* at 651-52. The Court used the due process balancing test of Goldberg v. Kelly, 379 U.S. 254, 263 (1970).

[61]Quilloin v. Walcott, 434 U.S. 246 (1978).

[62]441 U.S. 380 (1979).

[63]As such, the statute was subjected to heightened scrutiny under the rationale of Craig v. Boren, 429 U.S. 190 (1976), and Reed v. Reed, 404 U.S. 71 (1971).

Parham v. Hughes,[64] decided the same day as *Caban*, upheld the constitutionality of a Georgia statute that permitted a mother of an illegitimate child to sue for the child's wrongful death, but denied that right to the father unless he had previously legitimated the child. The Court cited the state's interest in avoiding fraudulent claims and problems of proof in paternity actions after the death of the child. The Court found no gender-based discrimination because the mothers and fathers were not similarly situated.[65] The Court noted that "[t]he justifications for judicial sensitivity to the constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent when a classification affects only the fathers of deceased illegitimate children."[66]

In 1983, the Court upheld a New York law that denied notification of adoption to unwed fathers who had not filed with the state's putative father registry.[67] The Court noted that the significance of the biological link between the father and his illegitimate child is that it offers him the *opportunity* to develop a relationship with his offspring.[68] When he failed to avail himself of this opportunity through use of the putative father registry, the father also failed to establish an interest that would be protected by due process. Although the father had taken many practical steps to establish a relationship with his child,[69] his failure to use the statutory mechanism was crucial.

After avoiding another adoption case,[70] the Court added a new twist to the rights of unwed fathers in *Michael H. v. Gerald D.*[71] In facts the Court hoped were "extraordinary,"[72] a married woman bore a daughter through an adulterous affair with her neighbor. After the woman and her daughter lived with the neighbor for a considerable period, the woman reconciled with her husband. The California courts denied the neighbor visitation rights on the strength of its Evidence Code provision that "the issue of a wife cohabiting with her husband. . .is conclusively presumed to be a child of the marriage."[73]

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[64] 441 U.S. 347 (1979).
[65] *Id.* at 355.
[66] *Id.* at 353.
[67] Lehr v. Robertson, 463 U.S. 248 (1983).
[68] *Id.* at 261-62.
[69] *See id.* at 269 (White, J., dissenting).
[70] McNamara v. County of San Diego Dep't of Social Serv., 488 U.S. 152 (1988) (dismissed for want of a properly presented federal question).
[71] 109 S. Ct. 2333 (1989).
[72] *Id.* at 2337. For a recent illegitimacy case with equally extraordinary facts, see Becker v. Sec'y of Health and Human Serv., 895 F.2d 34 (1st Cir. 1990).
[73] Cal. Evid. Code § 621 (West 1989).

Writing the plurality opinion, Justice Scalia held that the father did not have a fundamental liberty interest in his relationship with the daughter. The relationship was not one "traditionally protected by our society."[74] The daughter's claim (through a guardian ad litem) for visitation rights with her natural father also lacked the required basis in tradition.

Although Justice Stevens concurred in the judgment, he joined the four dissenting Justices in refusing to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married and cohabitating with another man at the time of the child's conception and birth."[75] Thus, the decade of the 1980's ended on a confusing note for the rights of unwed fathers.

B. SUMMARY AND FUTURE TRENDS

Examination of a statutory scheme involving illegitimate children must begin with the extraction of a method of analysis from the Supreme Court cases. The distillation starts with the dual inquiry of *Weber*, as to the character of the state interest and the nature of the personal rights involved. These lead to further questions about the degree of accuracy of the classification and the level of scrutiny with which the Court will examine it. Finally, a determination must be made concerning whose interests are involved (those of the illegitimate children or of the parents) and how those interests will be compared.

Generally, the government proponent of the classification has sought to advance one or more of four major objectives through statutes involving illegitimates: 1) preserving the institution of marriage and discouraging immorality; 2) avoiding fraud and problems of proof; 3) achieving finality in actions involving property rights at death; and 4) easing administration of government benefits.

The state goal of discouraging out-of-wedlock births and illicit sexual relations through schemes that punished the children involved was criticized in the earliest cases. The *Weber* Court called this type of scheme illogical and unjust.[76] By 1978, the Court approvingly noted the absence of this goal in the New York intestate succession law.[77]

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[74] *Michael H.*, 109 S. Ct. at 2341.
[75] *Id.* at 2347 (Stevens, J., concurring).
[76] *Weber* 406 U.S. at 175-76 n.14.
[77] *Lalli*, 439 U.S. at 259.

The strongest state goal in illegitimacy jurisprudence has been the interest in regulating the disposition of property at death.[78] The problem addressed by states is that of the unknown illegitimate child upsetting the distribution of property or later clouding its title. To some extent, this interest is tied together with concerns about problems of proof involving illegitimate children who only assert their claims after the father has died. Without these evidentiary concerns, the state could insure titles against unknown claimants by limiting the time period during which such persons can assert their claims.

The Court frequently has validated the goal of avoiding collusive suits and spurious claims. Problems of proof are especially important in cases where the father is not available to defend himself against a charge of paternity.[79] On the other hand, there is a possibility of fraud in almost any scheme likely to withstand judicial scrutiny.[80] The Court has invalidated numerous statutes that denied benefits or rights to illegitimate children in the name of preventing spurious actions. The Court has stated in recent years that this interest has become attenuated because of scientific advances in paternity testing.[81]

Another state interest that is endorsed by the Court is the "best interests of the child," although the interest usually is not identified in the statute in question. The Court deferred to this interest in several recent cases.[82] The best interests of the child may operate to deny many rights to unwed fathers, because courts generally consider the welfare of the child to be more important than parental rights.

The goal of easing administration of government benefits finds its clearest endorsement in *Mathews v. Lucas*. The Court said that a government agency can avoid the burden of case-by-case determinations if its regulatory scheme carefully is tuned to alternative considerations, such as allowing individual determinations in certain cases. In establishing a system involving illegitimate children, the governmental entity must consider the middle ground between com-

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[78]This state interest outweighed the interests of illegitimate children in both *Labine* and *Lalli*.

[79]*See Lalli*, 439 U.S. at 271-72.

[80]*See* O'Brien, ***Illegitimacy: Suggestion for Reform Following Mills v. Habluetzel,*** 15 St. Mary's L.J. 79, 119 (1983).

[81]*Pickett*, 462 U.S. at **17.**

[82]*See* Michael H. v. Gerald D., 109 S. Ct. 233 (1989); Lehr v. Robertson, 463 U.S. **248** (1983); Quilloin v. Walcott, 434 U.S. 246 (1978). These cases found the best interests of the child eclipsed the rights asserted by unwed fathers.

plete exclusion and case-by-case determinations. A statute can be overinclusive by granting a presumption of eligibility to legitimate children who might not otherwise be eligible. It will not be underinclusive, however, if ineligible illegitimate children can qualify for benefits by showing actual dependency outside the statutory categories.[83]

Nevertheless, the *Muthews v. Lucus* Court endorsed as reasonable the complete exclusion of illegitimate children who were in some sense dependent. This could include children who had been supported by the wage earner some time before his death or children who had a right of action for support against the wage earner. Thus, some illegitimate children still can be conclusively excluded by a statute that purportedly gives adequate concern to alternative considerations. In accepting the Social Security scheme, the Court noted that "the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be 'scientifically substantiated.'"[84]

The cases provide additional guidance on features of statutes that will allow for some different treatment based on legitimacy. For instance, the Court consistently has expressed disapproval of statutes that present an insurmountable barrier to illegitimate children or their parents. The absence of an insurmountable barrier was crucial in *Labine v. Vincent*,[85] which upheld an intestate succession law that denied inheritance from fathers to illegitimate children. The Court reasoned that a father easily could name his illegitimate children in a will.[86] In ***Lehr*** *v. Robertson* the Court found it significant that the father could have secured the notice of adoption he sought by using the state's putative father registry.[87] In other cases, however, the Court has held that the lack of an insurmountable barrier will not save an otherwise discriminatory statute.[88] An administrative procedure will not operate to save a statute if the procedure is too expensive.[89]

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[83]*Mathews*, **427** U.S. at 512.
[84]*Id.* at 510-11.
[85]401 U.S. 532 (1971).
[86]*Id.* at 536. The Court held a similar statute unconstitutional in *Trimble* four years later. Without expressly overruling *Labine*, the *Trimble* Court noted: "[I]t is apparent that we have examined the Illinois statute more critically than the. . .statute in *Labine*." *Trimble*, 430 U.S. at 776 n.17.
[87]*Lehr*, 463 U.S. at 261-62.
[88]*See Trimble*, 430 U.S. at 774.
[89]*See Stanley*, **406** U.S. at 647. The father in *Stanley* could have adopted his children, but the procedure would have been too expensive.

Although the cases are inconsistent in this respect, a crucial element of a valid statutory scheme will be one that unilaterally allows unwed parents to qualify their children for benefits. At the same time, statutes must give illegitimate children a reasonable opportunity to obtain support from their parents.[90]

The fundamental rights of illegitimate children against which the government goals are balanced include the rights to receive government benefits, to maintain suits against parents for support, and to inherit property. The fundamental rights of parents include the care, custody, maintenance, and education of their children. These rights are subject to several conditions that can be extracted from the cases.[91] First, an unwed father must establish a substantial or significant relationship with his child before he will gain a voice in its custody and upbringing. The father can do this either through monetary support or through contact with the child. Second, the unwed father who complies with state-created procedures to identify himself will be entitled to notice before a state can terminate his parental rights. Finally, a relationship otherwise entitled to protection will be denied recognition if it will disrupt a peaceful marriage, such as in *Michael H.* v. *Gerald* **D.**

The level of scrutiny applied to illegitimacy issues is crucial, and this factor can explain the results of almost all the principal cases.[92] The earliest illegitimacy decisions did not address the level of scrutiny required because the schemes involved were irrational. Throughout the 1970's, the Court did not specify an appropriate level of review, but it did express concern about laws that discriminated against illegitimate children because of the status of their birth.[93] At the same time, the Court decided not to use the strictest level of scrutiny because illegitimate children do not have the same obvious badge of opprobrium that members of minority races do. The level of scrutiny was to be "less than the strictest" but not "toothless."[94]

By the 1980's, the Court produced unanimous opinions that endorsed and described an intermediate level of scrutiny. Even Justice Rehnquist, who had rejected intermediate scrutiny in his **Weber** dis-

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[90] *See supra* text accompanying notes 54-57.

[91] *See* Note, *A Modern-Day Solomon's Dilemma: What of the Unwed Father's Rights?*, 66 U. Det. L. Rev. 267 (1989).

[92] *See* Zingo, *Equal Protection for Illegitimate Children: The Supreme Court's Standard for Discrimination*, **3** Antioch L. J. 59, 88 (1985).

[93] *See* **Weber,** 406 U.S. at 175-76.

[94] *Mathews*, 427 U.S. at 510.

sent,[95] joined the ***Pickett*** opinion calling for a heightened level of scrutiny.[96] By 1988, the unanimous Court stated: "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or legitimacy."[97]

The analytical framework that the Court applies in reviewing a statute is important. A law is less likely to survive judicial review if it discriminates directly against illegitimate children. When the effects of the statute on illegitimate children are only indirect, unwed mothers[98] and unwed fathers[99] will find their claims given considerably less judicial consideration. An unwed parent's claim has a greater likelihood of success if it is based on due process rather than equal protection grounds. Most recently, *Michael H. v. Gerald D.* makes doubtful the future success of claims alleging discrimination between wed and unwed persons.

Change in the Supreme Court's treatment of illegitimacy may occur for a variety of reasons. Many commentators trace changes in illegitimacy jurisprudence to changes in the Court's membership. For instance, as the Warren Court transformed into the Burger Court of the 1970's, the Court demonstrated increasing deference to state statutes involving illegitimacy.[100] In the 1980's however, the Court was less deferential to state statutes.[101] None of the presently sitting Justices consistently vote against the interests advanced by illegitimate children.[102] Despite changes in the Supreme Court's membership, it does not seem that there will be a dramatic reversal in jurisprudence involving illegitimate children or their parents.

Justice Scalia's emphasis on the necessity for traditional recognition of rights and relationships in *Michael H. v. Gerald D.* represents a change. This analysis, however, has precursors in legitimacy jurisprudence as far back as the *Labine* opinion in 1971. In that case, both the dissent and Justice Harlan's concurring opinion considered the

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[95] *Weber*, 406 U.S. at 183.
[96] *Pickett*, 462 U.S. at 8.
[97] *Jeter*, 486 U.S. at 461.
[98] *See supra* notes 46-39 and accompanying text.
[99] *See supra* notes 62-66 and accompanying text.
[100] *See* Zingo, *supra* note 92, at 88-89.
[101] *See* ***id.*** at 91
[102] *See* Note. *Jones v. Schweiker: Illegitimate Children and Social Security Benefits*, 16 Ind. L. Rev. 887 (1983). .Justices Harlan and Black consistently voted against illegitimate children before they retired; Justices Douglas and Brennan consistently voted in favor of the claims of illegitimate children.

status of illegitimate children at the time the fourteenth amendment was passed.[103] Although the Court may use this approach more frequently in the future, its special reliance on it in ***Michael H. v. Gerald D.*** may have been a product of the peculiar facts in that case.

In one area, changes in technology are likely to result in a change in the value the Court gives to the state interest in problems of proof. The Court has suggested that interests in preventing litigation of stale or fraudulent claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof in paternity actions.[104] Admissibility of genetic and blood group testing was in doubt at the beginning of the 1980's.[105] Ten years later, every state but South Dakota has a statute providing for the admission of at least some genetic tests in paternity suits.[106] Eight states allow scientific evidence of inclusion of a defendant-putative father to create a presumption of paternity.[107] Since the most recent Supreme Court review of paternity testing in ***Clark v. Jeter***,[108] genetic testing has become even more advanced. New DNA tests come much closer to being able to provide a positive identification of a person as the father of a child, in addition to being able to exclude someone as a biological parent. With the new generation of tests, the odds of false identification can be as low as one in thirty billion.[109] Ultimately, we can expect the Court to be even less receptive in the future to rules that restrict paternity actions or other actions involving the issue of paternity simply for the sake of avoiding stale or fraudulent claims.

Although the Court has determined that the intermediate level of scrutiny is appropriate for legitimacy classifications, plaintiffs may try to frame those classifications so they receive stricter scrutiny. Statutes that discriminate on the basis of race receive strict scrutiny, and a proportionately greater number of illegitimate children are black. The Supreme Court specifically declined to consider whether

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[103] *See Labine*, 401 U.S. at 540, 553-54. This colloquy reveals that courts at the time of passage of the fourteenth amendment could force parents of illegitimate children to support their offspring.

[104] *Pickett*, 462 U.S. at 17.

[105] *See* Ellman & Kaye, ***Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?***, 54 N.Y.U. L. Rev. 1131 (1979).

[106] *See* Kaye, ***Admissibility of Genetic Testing in Paternity Litigation: A Survey of State Statutes,*** 22 Fam. L.Q. 109 (1988).

[107] The states are: Alaska, Florida, Oklahoma, Colorado, Maine, California, Wisconsin, and Texas. ***See id.*** (complete description of all state statutes on admissibility of scientific tests for paternity).

[108] *Jeter*, 486 U.S. at **465.**

[109] *See* Haas, ***From Here to Paternity: Using Blood Analysis to Determine Parentage***, 61 Wis. B. Bull. 24, 27 (1988).

the Illinois intestate succession statute in *Trimble* discriminated on the basis of race because of its disproportionate impact on black people."()Nevertheless, any statute that affects illegitimate children will have a disproportionate impact on minority children.

The Court has held that disparate impact on an acknowledged suspect class, without more, required judicial review under only the rational basis standard."' To invoke stricter scrutiny, the invidious quality of the law must be traced to a racially discriminatory purpose.[112] On the other hand, the racially motivated actor can be someone from the remote past.[113] Given the historical persistence of the disparity of the illegitimacy rates between whites and minorities, the discriminatory purpose may be easy to infer, if not easy to find. In common law, segregation of rich and poor was one of the purposes of rules on legitimacy; an important function of the *filius nullius* rule in England was to ensure that children of noblemen and serfs did not inherit land.[114] These factors, combined with the fact that illegitimate children are in a disadvantaged class themselves, eventually may cause the Court to consider the disparate impact of an illegitimacy classification independent of any overt racially discriminatory purpose.

Finally, the Court's illegitimacy jurisprudence may evolve as a result of the changing moral structure of American society. The illegitimacy rate continues to rise and is no longer confined to unwanted teenage pregnancies as it once might have been. For instance, older single women are now having children because they want to do so while they are still biologically able.[115] The institution of marriage itself is changing as well. The Court may increasingly face fact situations like that in *Michael H. v. Gerald D.* These situations may become more common as marriages disintegrate in greater proportions and children seek to maintain relationships with multiple sets of parents. Nontraditional relationships outside of marriage will produce children who are at least nominally illegitimate; in turn, these children and their parents will assert greater rights in the courts.

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[110]*Trimble*, 430 U.S. at 766 n.10.

[111]*See* L. Tribe, American Constitutional Law 1502-14 (1988).

'"Washington v. Davis, 426 U.S. 229, 240 (1976).

[113]*See* Hunter v. Underwood, 471 U.S. 222 (1985). The Court found racial animus for a modern law in the Alabama Constitutional Convention of 1901, which had the avowed purpose **of** establishing white supremacy.

[114]*See* J. Teichman. *supra* note 1. **at** 55-60.

[115]*See Births Rise for Unwed Women*, N.Y. Times, July 30, 1986, at C4, col. 6.

111. THE MILITARY BENEFIT STRUCTURE AND ILLEGITIMATE CHILDREN

A variety of military programs offer benefits to illegitimate children and their parents. Some have done so for many years, while others have included illegitimate children only as a result of judicial intervention. The various programs are not coordinated as they affect illegitimate children; each has its own definition of which children are qualified for benefits.

The programs have three different measures of determining eligibility for benefits, and most of these are tied to a requirement that the beneficiary be a "dependent." The first is the existence of a legal family relationship. The second measure is the amount of financial support a service member provides to the child in question. Finally, some definitions require a child to live in a household provided by the military sponsor in order to qualify for military-related benefits.

Many programs combine two or more of these definitions. In each case, illegitimate children are treated differently than legitimate children. This article sets out the various criteria in the major benefit programs and then questions whether the differentiation involving illegitimate children is justified and constitutionally permissible.

A. QUARTERS ALLOWANCE

Congress first authorized Basic Allowance for Quarters (BAQ) at the "with dependents" rate[116] on behalf of illegitimate children in **1973** when it revised the definition of dependents in **37** U.S.C. section 401.[117] The change was in reaction to a decision by a United States district court that forbade denial of medical benefits to an illegitimate child of a service member? The law changed the definition of depen-

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[116]Soldiers can receive **BAQ** when they have no dependents at all if they are not living in government-provided quarters. **BAQ** is paid at a higher rate if the soldier has eligible dependents. Thus **BAQ** can be at the "without dependents" rate or at the higher "with dependents" rate.

[117]Pub. L. No. 93-64, 87 Stat. 147 (codified as amended at 37 U.S.C. § 401 (1988)). Prior to this time, 37 U.S.C. § 401 included only legitimate children. In addition to **BAQ,** the change in definition allowed service members to receive travel allowance and family separation allowance for illegitimate children (providing other criteria were met).

[118]*See* Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972); S. Rep. No. 235, 93rd Cong., 1st Sess.. ***reprinted in*** 1973 U.S. Code Cong. & Admin. News 1580.

dent unmarried children to include illegitimate children whose member-father has been judicially decreed to be the father of the child, judicially ordered to contribute to the child's support, or whose parentage has been admitted in writing by the member-father.[119] The law affected only pay and allowances and did not cover medical care eligibility.

The Department of Defense Pay and Allowances Entitlement Manual[120] (Pay Manual) adds several guidelines that condition eligibility for "with dependents" BAQ on behalf of illegitimate children. First, the Pay Manual explains that both member-fathers and member-mothers must admit parentage in the absence of a judicial decree.[121] The Pay Manual then establishes two separate categories of member-parents, each with different requirements for BAQ entitlement. When the member is assigned "single-type'' government quarters and the child is in custody of another person, the member must show that he or she is providing support to the child equal to BAQ at the "with-dependents" rate for the member's pay grade.[122] Member parents who are not assigned government quarters must show that they are providing monthly support in an amount that is the greater of one-half the child's actual support requirement or the difference between the applicable BAQ at the "with-dependents" rate and the "without-dependents" rate.[123]

The Pay Manual requires documentary proof that the member has provided the illegitimate child support in at least these amounts before the member is entitled to receive BAQ.[124] This requirement apparently is designed to ensure that the member intends to provide continued support to the child after he or she begins receiving BAQ. Although the origin of this requirement is not clear, its purpose may be to deter fraudulent applicants on the assumption that such applicants would not pay any support without first receiving entitlement to the allowance. In any case, the Pay Manual requires annual recertification of dependency and proof that the member provided support at the required level.[125]

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[119]37 U.S.C. § 401(2) (1988). The definition applies to all children who are under 21 years of age, or who are incapable of self-support and are in fact dependent on the member for over one-half of their support.

[120]Dep't of Defense, Military Pay and Allowances Entitlements Manual (C15, 18 Aug. 1989) [hereinafter Pay Manual].

[121]*Id.* para. 30238.

[122]*Id.* para. 30238b. This category would apply most often to soldiers in Initial Entry Training.

[123]*Id.* para. 30238c.(1), (2). The guideline does not require support under this formula in excess of the applicable BAQ at the "with-dependents" rate.

[124]*Id.* para. 30238c.

[125]*Id.* para. 30238a.

The Pay Manual states that a child will be considered legitimate if the parents subsequently marry.[126] It also provides that BAQ will not be authorized to the natural mother or father once the illegitimate child is adopted by another person.[127] The member may claim the illegitimate child of a spouse as a dependent even though the member is not the natural parent.[128]

Army Regulation 37-104-3[129] sets out the system for processing applications for BAQ. While the local Finance and Accounting Officer (FAO) can approve most applications, the Commander, United States Army Finance and Accounting Center (USAFAC), must review applications for illegitimate children.[130] The local FAO can authorize interim BAQ if the illegitimate child is in the custody of the member-parent.[131] Otherwise, the soldier must await approval from USAFAC before receiving BAQ, although he will receive it retroactive to the date of his application if it is approved. For illegitimate children in the custody of someone other than the claimant, the application must include a statement by the child's custodian detailing the financial support sent by the soldier and the child's expenses.[132]

The Pay Manual requires only proof of relationship to authorize BAQ for spouses and legitimate children.[133] There is no requirement that the soldier show that he or she is providing support prior to authorization of BAQ. For illegitimate children, adopted children, and stepchildren, the BAQ applicant must show that the child actually is dependent.[134] The Army regulation speaks of a dependency determination in all cases, but for spouses and legitimate children this amounts to little more than presentation of a marriage or birth cer-

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[126] *Id.* para. 30238d. The member then can receive BAQ on the child's behalf under Pay Manual para. 30232.

[127] *Id.* para. 30238e.

[128] *Id.* para. 20238f. The language of this section refers specifically to member-fathers who marry women with illegitimate children. The section is ambiguous enough to include a family situation where the gender roles are reversed.

[129] Army Reg. 37-104-3, Military Pay and Allowances Procedures, Joint Uniform Military Pay Systems (JUMPS-Army) (10 Aug. 1988) [hereinafter AR 37-104-3].

[130] *Id.* para. 2-11. This includes illegitimate children legitimated by court order.

[131] *Id.* para. 21-11h(2). The soldier must provide a birth certificate showing that the soldier is the parent of the child and must also indicate that he or she is providing financial support to the child.

[132] *Id.* para. 21-11k(5). The custodian must state how the support funds are actually used and whether the child has any independent sources of income. Similar information is required for application on behalf of adopted children or stepchildren who do not live with the claimant. For these claimants, however, the local FAO can authorize BAQ.

[133] Pay Manual, para. 30232.

[134] *Id.* paras. 30238, 30239.

tificate.[135] The local FAO will make a dependency determination for adopted children and stepchildren, but the support requirements are less stringent than those for illegitimate children. A soldier with adopted children or stepchildren must show that he provides thirty percent of the child's support. The parent of an illegitimate child must show that he provides at least fifty percent of the child's support.[136]

On its face, 37 U.S.C. section 401 would pass constitutional muster. An unwed father can draw BAQ on behalf of a child simply by acknowledging paternity in writing. The statute is over-inclusive in that it presumes legitimate children to be dependent. Nevertheless, this type of over-inclusiveness is allowed under the logic of *Mathews v. Lucas* because the parent of an illegitimate child can qualify his or her child through written acknowledgment.

As the statute is implemented by the Pay Manual, however, unwed parents are faced with an additional hurdle of having to prove a specified level of support before the government will authorize BAQ. Compared to soldiers with legitimate children, this places at a disadvantage those who cannot provide their illegitimate children with one-half of their necessary support. Disadvantaged soldiers would include those witn illegitimate children who live with mothers who earn more than the soldier-fathers and those who live with other relatives such as grandparents. The requirement especially affects soldiers in the lower enlisted ranks whose pay rates will be relatively low when compared to the financial needs of their children. It might dissuade young, unwed fathers already in the work force from joining the Army if they see themselves as being at a disadvantage compared to similarly situated young men with legitimate children.

It is questionable whether Congress envisioned this sort of barrier to the support of illegitimate children when it revised 37 U.S.C. section 401. At the same time Congress acted to include illegitimate children as dependents, it let lapse the requirement for mandatory dependent allotments for junior enlisted personnel.[137] Congress felt

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[135] AR 37-104-3, para. 21-lla. The local FAO will verify this information. If the BAQ is for the child of a former marriage, the applicant must also present a copy of the divorce decree.

[136] Under the Pay Manual, the applicant must provide a "substantial" amount of the support for an adopted child or step-child. Pay Manual, para. 30239c. AR 37-104-3 interprets this to require the applicant to provide at least 30% of the child's total support.

[137] S. Rep. No. *235,* 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1584, 1588-89. Prior to this, junior enlisted personnel had to have in place an automatic "Q Allotment" for their dependents to draw BAQ.

that by ending this requirement, it would reduce administrative costs, improve morale, and recognize that soldiers who could be trusted with expensive equipment should be permitted to be responsible for their own families.[138] It is ironic that the Department of Defense established a similar mandatory support requirement for parents of illegitimate children as an outgrowth of the same congressional action.

The scheme by which the local FAO makes most eligibility determinations, but the Commander of USAFAC makes determinations in cases involving illegitimate children, probably originated as a measure to prevent fraud. The lack of a legal relationship between the parent and the illegitimate child makes it easier for a soldier fraudulently to claim a dependency relationship with a child with whom he has no biological relationship. If the system did no more than subject applications on behalf of illegitimate children to greater scrutiny, it would be constitutionally acceptable. In several respects, however, it operates unfairly as it affects illegitimate children.

The differing percentage of support required for adopted and stepchildren contained in the Pay Manual has no rational explanation. This rule allows adopted children or stepchildren to receive up to seventy percent of their support from sources other than the soldier. The same children, if illegitimate, would have to receive fifty percent of their support from the soldier for the member to qualify for BAQ. This disparity is neither rational nor fair. It probably would not pass constitutional muster if it were challenged by the parent of an illegitimate child who received thirty percent of his support from an otherwise eligible soldier.

The government could argue, as it did in *Califano v.* ***Boles,*** that this benefit goes to the unwed parent and only indirectly benefits the illegitimate child. This argument fails when one considers that the soldier is required to pay the full amount of BAQ to the child and will lose the allowance if he does not.

Perhaps the most unfair aspect of the BAQ authorization system is the difficulty that unwed fathers face in getting BAQ. Again, problems of proof may justify having USAFAC make the decision instead of the local FAO. Unlike parents of legitimate children, however, the parent of an illegitimate child must show proof that he is paying the required amounts before being authorized BAQ. This especially will

[138] *Id.*

be difficult for new soldiers living in the barracks, because they must show that they are paying the full amount of BAQ to their illegitimate child for at least a month before they actually begin to receive BAQ.[139] These soldiers receive so little pay that after deductions for educational benefits, taxes, and initial equipment expenses, they may be unable to pay the child the full BAQ amount. The problem is especially severe for soldiers in Initial Entry Training who are unable to communicate with the custodians of their illegitimate children to get required information on expenses and other income of the children.[140]

A tragic example of a soldier in this predicament can be seen in *Norton v. Mathews*,[141] a companion case of *Muthews v. Lucas*. *Norton* was a suit for Social Security benefits by an illegitimate child situated similarly to the plaintiff in *Lucus*, and the benefits were denied on the same grounds as in *Lucas*.[142] When the child was born, the unwed father was sixteen years old. He contributed money and clothing for the child, but being so young, he never was able to assume actual support. When he entered military service, the father attempted to get the dependent support allowance on behalf of the child. He failed to complete the required procedures before being killed in Vietnam in 1966.[143]

The current system for BAQ authorization would allow this situation to recur. If the requirements are meant to prevent fraud and to ensure that the soldier actually provides the BAQ to the child, this could be accomplished in a less drastic way. Because the member's application for BAQ already is given individual attention, USAFAC just as easily could determine whether the soldier was supporting the child to the best of his ability before he entered active duty. The Social Security Administration frequently makes this kind of determination of dependency.[144] The test is whether the insured was supporting his child commensurate with his ability and whether these payments were important in meeting the child's needs.[145]

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[139]Approval of the application by USAFAC normally takes two to three months. This estimate is based on telephone conversations with personnel at the United States Army Finance and Accounting Center in December 1989.

[140]I base this observation in part on my experience at the Legal Assistance Office at Fort Leonard Wood, an Initial Entry Training installation.

[141]427 U.S. **524** (1976).

[142]The Court also discussed an unrelated jurisdictional issue. *See id.* at 528-38.

[143]*Id.* at 525-26.

[144]The administration makes these determinations pursuant to 42 U.S.C. § 416(h)(3)(c)(ii) (1988).

[145]*See* Hammonds for Green v. Bowen. 652 F. Supp. 491 (S.D.N.Y. 1987). For a discussion of the adequacy of support to a posthumously born illegitimate child, ser Bennemon v. Sullivan. 914 F.2d 987 (7th Cir. 1990)

Unwed mothers rarely have their "maternity" decreed by a court. As a result, 37 U.S.C. section 401 requires those who have joined the armed forces to admit parentage of their illegitimate children in writing to establish eligibility for BAQ. The Department of Defense considers this treatment of unwed mothers unnecessary and will recommend it be eliminated in the 1991 appropriations bill.[146]

B. VETERANS' BENEFITS

A variety of benefits are available to illegitimate children of deceased soldiers and veterans. Veterans' legislation includes illegitimate children in its definition of children.[147] It includes all illegitimate children of a female veteran[148] and sets out four types of eligible illegitimate children of male veterans. An illegitimate child is qualified

> as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Administrator to be the father of such child.[149]

The definition of "child" in the list of beneficiaries under the Servicemen's Group Life Insurance (SGLI) statute is somewhat different. The definition specifically includes all illegitimate children of female decedents.[150] It replicates 38 U.S.C. section 101 by including acknowledged children, judicially decreed children, and those the father has been judicially ordered to support.[151] Rather than providing a catch-all category of those whose relationship is demonstrated to the

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[146] *Easing Up on Unwed Mothers,* Army Times, Nov. 20, 1989, at 25, col. 1.

[147] Illegitimate children were first included as veterans' compensation beneficiaries in 1934. *See* Pub. L. No. 73-867, 48 Stat. 1282 (1934). Children also must be unmarried and either under eighteen years old; have become permanently incapable of self-support prior to reaching eighteen years old; or attending a course of instruction at an approved educational institution while under the age of twenty-three. 38 U.S.C. § 101(4)(A) (i-iii) (1988).

[148] The statute does not specifically mention illegitimate children of female veterans, but simply qualifies those "as to the alleged father." 38 U.S.C. § 101(4)(A) (1988). The Death Gratuity statute (10 U.S.C. § 1477 (1988)) used 38 U.S.C. § 101 as a basis for its definitions. The current version of 10 U.S.C. § 1477 refers specifically to "illegitimate children of a female decedent." 38 U.S.C. § 765 (1988) (defining SGLI beneficiaries) also includes all illegitimate children of a mother.

[149] 38 U.S.C. § 101(4)(A) (1988).

[150] *Id.* § 765(8).

[151] *Id.*

satisfaction of the administrator, however, the SGLI statute creates two new categories. These include a child if

> proof of paternity is established by a certified copy of the public record of birth or church record of baptism showing that the insured was the informant and was named as father of the child; or. . .proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the insured was named as father of the child.[152]

This addition has the effect of eliminating informally acknowledged illegitimate children as beneficiaries. Nevertheless, almost any written acknowledgment is sufficient. In *Prudential Insurance Company of America v. Jack*[153] a Marine admitted in letters to his fiancee that the child she was expecting was his and promised to marry her when he completed basic training. He died, however, just before he completed training. The court held that the letters constituted sufficient acknowledgment. The illegitimate daughter in *Labine v. Vincent* qualified for veteran's benefits because of her father's acknowledgment, even though the state's intestate succession law denied her an inheritance.[154]

A federal statutory order of precedence for the distribution of SGLI proceeds is found in 38 U.S.C. section 770:

> First, to the beneficiary or beneficiaries as the member. . .may have designated [in writing];
>
> Second, if there be no such beneficiary, to the widow or widower of such member. . .;
>
> Third, if none of the above, to the child or children of such member. . .and descendants of deceased children by representation;
>
> Fourth, if none of the above, to the parents of such member . . .or the survivor of them;
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> Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member. . . :

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[152] *Id.* § 765(8)(d)-(e). This provision survived constitutional challenge in Prudential Ins. Co. of Am. v. Moorhead, 730 F. Supp 727 (M.D. La. 1989), *aff'd*, 916 F.2d 261 (5th Cir. 1990). In denying SGLI proceeds to a posthumously born illegitimate daughter of an active duty sailor, the court found that section 765(8) was related substantially to governmental objectives involving uniformity, accuracy of proof of paternity, orderly disposition of property, and suppression of fraudulent claims.

[153] 325 F. Supp. 1194 (W.D. La. 1971).

[154] *Labine*, 401 U.S. at 535 n.3.

> Sixth, if none of the above, to other next of kin of such member. . .entitled under the laws of domicile of such member. . .at the time of the insured's death.[155]

Although parents of veterans generally are included as a category of statutory beneficiaries, unwed fathers of decedents are allowed as beneficiaries only when their relationship is established under one of the same criteria used for illegitimate children.[156] In addition, "[n]o person who abandoned or willfully failed to support a child during the child's minority, or consented to the child's adoption may be recognized as a parent. . . ."[157] In an interpretation of this provision, a divorced mother was held not to have abandoned her son in *Locano* v. *Prudential Insurance Company.*[158] Another case held that both parents had abandoned the deceased soldier before his death and ordered the proceeds paid to unrelated administrators of the estate under the order of precedence in 38 U.S.C. section 770(a).[159]

Except in those cases in which proceeds go to a next of kin rather than to a specifically enumerated beneficiary, the federal scheme is wholly independent of the intestate succession laws of any state. Thus, it does not matter if an illegitimate child cannot take from its father under state law.[160] The SGLI statute differs in this respect from the Social Security eligibility statute. The latter statute includes as beneficiaries those children who would take personal property from the insured individual under the law of intestate succession of the state in which the insured became disabled or died.[161] This rule has

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[155] 38 U.S.C. § 770(a) (1988). In the event the deceased soldier had no next of kin, the insurance proceeds would probably go to the federal government rather than escheat to the state.

[156] 38 U.S.C.A. § 765(9) (West Supp. 1990). For a restrictive reading of section 765(9)(e), see Prudential Ins. Co. of Am. v. Whitney, 745 F. Supp. 1506 (W.D. Mo. 1990) (father not an eligible SGLI beneficiary even though deceased soldier named him as a father on a "Beneficiary Designation Card").

[157] *Id.*

[158] 544 F. Supp. 306 (E.D. Mich. 1982). Prior to the service member's death on active duty in 1980, the mother wrote numerous letters to her children and frequently attempted to enforce her visitation rights. She also paid child support, although she was in arrears when her son died.

[159] Prudential Ins. Co. of Am. v. Burns, 513 F. Supp. 280 (D. Mass. 1981), *aff'd*, 676 F.2d 681 (1st Cir. 1982). The court acknowledged the possibility that under state law, the administrator would have to disburse the proceeds to at least one of the parents.

[160] Manning v. Prudential Ins. Co. of Am., *330* F. Supp. 1198 (D. Md. 1971) (SGLI proceeds ordered to illegitimate daughter even though she could not inherit from the insured under North Carolina intestate succession law).

[161] 42 U.S.C. § 416(h)(2)(a) (1988). Illegitimate children can also qualify under several criteria similar to those in *38* U.S.C. § 101. ***See*** 42 U.S.C. § 416(h)(3).

spawned a tremendous amount of litigation[162] and results in different treatment of children that has nothing to do with the relationship between the insured and the child. For instance, a child from California can receive benefits that would be denied him if he lived in Texas.[163] Because neither the Department of Veterans' Affairs nor the active duty benefits statutes rely on state intestate succession law, they avoid controversies such as these.

On the other hand, state intestate succession schemes typically give a share to both a spouse and surviving children.[164] Because 38 U.S.C. section 770 gives spouses benefits to the exclusion of children, the system is not as fair as the typical intestate succession scheme. An illegitimate child is most likely to suffer. A surviving spouse, for instance, likely will share benefits with his or her own children, while ignoring the needs of the deceased spouse's illegitimate children.

A soldier is free to designate an otherwise ineligible illegitimate child as his SGLI beneficiary. The child will receive the proceeds even if a Survivor Assistance Officer initially notified the soldier'sparents that they were the beneficiaries.[165] Some soldiers, however, may designate payment of proceeds "by law," thinking that this election would cover their illegitimate children, when in fact it would not.

Dependent and Indemnity Compensation (DIC) is authorized for the children of a deceased veteran, providing the veteran does not leave a surviving spouse.[166] The DIC is paid in equal shares to the children. Legitimate and illegitimate children share the benefits equally.[167] If a spouse survives, children receive no direct payment and illegitimate children probably receive no indirect support either. The DIC statute authorizes payments to children under some circumstances even in cases with surviving spouses.[168] This would include illegitimate children as defined in 38 U.S.C. section 101.

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[162] *See, e.g.*, Smith v. Bowen, 862 F.2d 1165 (5th Cir. 1989); Trammel on Behalf of Trammel v. Bowen, 815 F.2d 167 (7th Cir. 1987); Moorehead v. Bowen, 784 F.2d 978 (9th Cir. 1986).

[163] *Moorehead*, 784 F.2d at 978. Although the decedent lived in Texas, the court determined that Texas choice of law rules would look to California law to see if the child was legitimate.

[164] *See* Unif. Probate Code, § 2-102, 8 U.L.A. 59 (1983).

[165] *See* Decker v. United States, 603 F. Supp. 40 (S.D. Ohio 1984).

[166] 38 U.S.C. § 413 (1988).

[167] 38 U.S.C. § 413 relies on 38 U.S.C. § 101 for its definition of children.

[168] This includes children over eighteen who became permanently disabled before reaching that age, and children between eighteen and twenty-two who are attending an approved educational institution. 38 U.S.C. § 414(b),(c) (1588).

A death gratuity is authorized for payment to children of members who die on active duty, provided no spouse survives.[169] The payment is made to all children in equal shares and includes all illegitimate children of female decedents.[170] For male decedents, eligibility of illegitimate children is conditioned on the same criteria as veterans' benefits,[171] although the criteria are listed in a different order.[172]

By eliminating the catchall category of **38** U.S.C. section 101 for children whose parentage is shown to the satisfaction of the Administrator, the SGLI statute eliminates from eligibility a large number of informally acknowledged illegitimate children. The categories listed in **38** U.S.C. section **765** may have been meant to simply show two types of evidence that would be satisfactory to show dependency. The statute would be fairer if it contained a catchall category that included children of fathers who provided financial support, yet never acknowledged parentage in writing.

The ability of a father to include his illegitimate child as an SGLI beneficiary simply by admitting paternity in writing is probably a voluntary administrative mechanism similar to the putative father registry in ***Lehr*** *v.* ***Robertson.*** Although it would serve the statute well in judicial review, it would be of little practical advantage to soldiers if they did not know about it. Soldiers also should understand that illegitimate children will not necessarily be SGLI beneficiaries if they designate "by law" on their SGLI applications.

C. MEDICAL CARE

Through the Dependent Medical Care Act,[173] Congress sought "to create and maintain high morale in the uniformed services"[174] by

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[169]10 U.S.C. § 1477 (1988).

[170]*Id.* § 1477(a).

[171]The original legislation referred to a Veteran's Administration publication for the definitions of "parents" and "children." ***See*** Servicemen's and Veteran's Survivor Benefits Act, Pub. L. No. 881, § 102, 70 Stat. 857, 858-61 (1956). Congress codified the current definitions by Pub. L. No. 85-861, § 1(32)(A), 72 Stat. 1437, 1452 (1958) (codified as amended at 10 U.S.C. § 1475 (1988)). The definition is nearly the same as that for illegitimate children found in 38 U.S.C. § 101.

[172]10 U.S.C. § 1477(b)(5) includes illegitimate children of a male decedent:

(A) who have been acknowledged in writing signed by the decedent;

(B) who have been judicially determined, before the decedent's death to be his children;

(C) who have been otherwise proved, by evidence satisfactory to the Administrator of Veterans' Affairs, to be the children of the decedent; or

(D) to whose support the decedent had been judicially ordered to contribute.

[173]Pub. L. No. 569, 70 Stat. 250 (1956).

[174]10 U.S.C. § 1071 (1988).

providing medical care to service members, retirees, and their dependents. The Act specifically excluded illegitimate children from eligibility.[175]

Illegitimate children challenged this exclusion in 1972 in *Miller v. Laird*.[176] The plaintiff in this class action suit was the illegitimate child of a soldier who was then serving in Vietnam. Although a District of Columbia court had determined the soldier's paternity and ordered weekly support, he was not contributing any support at the time of the suit.[177] The child's mother and grandmother wanted to qualify her for medical care at a local Army hospital in the event of future illness.

The court could find no rational basis in any of the four principal arguments in favor of the exclusion offered by the government. Defendants claimed that the disqualification of illegitimate children served the statutory purpose of "maintaining morale" by "selecting for benefits those children about whom a service member would be most concerned."[178] The court called the notion of a general lack of concern for illegitimate children "sheerspeculation." Acknowledging that there were problems of proof involved in determining paternity of illegitimate children, the court cited several federal statutes that contained safeguards against spurious claims by illegitimate children without a total exclusion.[179] The government then argued that the disqualification tends to preserve the integrity of marriage and promote family relationships. The court could find no basis in logic for the assumption that medical care for potential offspring would be a factor in whether people engaged in illicit relationships. Finally, defendants argued that inclusion of illegitimate children would require them to provide medical care to a large number of children born outside the United States. While noting that this had nothing to do with the statutory purpose of maintaining morale, the court added that the government may not attempt to conserve its fiscal resources by drawing invidious classifications.

Applying the "stricter scrutiny" required by *Weber*,[180] the court held that the exclusion of illegitimate children denied the plaintiff due

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[175] *Id.* § 1072(2)(D).
[176] 349 F. Supp. 1034 (D.D.C. 1972).
[177] *Id.* at 1038.
[178] *Id.*
[179] These included 38 U.S.C. § 101(4) and 42 U.S.C. § 416(h)(3). *See supra* notes 147-49 and accompanying text.
[180] *Miller*, 349 F. Supp. at 1046.

process of law in violation of the fifth amendment. Although referring to the *Weber* standard, the court also held that the ban on benefits was "utterly lacking in rational justification" as applied to illegitimate children whose paternity had been judicially established.[181] Accordingly, the court declared the plaintiff and other members of her class eligible for medical care under the Act.[182]

Army Regulation 40-121[183] was changed in 1973 to authorize medical care for illegitimate children "whose paternity has been judicially determined."[184] Eligibility was effective as of August 31, 1972, the date of the *Miller v. Laird* decision. The court decision also seems to be the source of the judicial paternity determination requirement in AR 40-121.

In some circumstances, the Department of Defense has authorized medical care for illegitimate children whose paternity is not judicially determined.[185] To qualify, the child must live in a household maintained by or for a service member and must be dependent on that member for over fifty percent of his or her support.[186] Medical care is authorized for illegitimate children of female service members regardless of where the child lives or the extent to which the mother provides support.[187] Commissary privileges for any illegitimate child requires that the child live in a member's household and be dependent on that sponsor for over fifty percent of his or her support.[188] Illegitimate children have theatre and exchange privileges if they are dependent on a member for over fifty percent of their support, regardless of where they live.[189]

Determination of eligibility for dependent medical care is governed by Army Regulation 640-3.[190] In many ways, it mirrors the Pay Manual and AR 37-104-3 in setting out criteria and procedure for

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[181] *Id.*

[182] *Id.* at 1047.

[183] Army Reg. 40-121, Medical Services: Uniformed Services Health Benefit Program (15 Sept. 1970) (C1, 15 June 1973) [hereinafter AR 40-121 (C1, 1973)].

[184] *Id.* para. 3-2f. Congress never has amended 10 U.S.C. § 1072 in response to *Miller v. Laird.*

[185] Dep't of Defense Instruction 1000.13, Identification Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (June 6, 1984) [hereinafter DOD Instr. 1000.131.

[186] *Id.* Encl. 6.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Army Reg. 640-3, Identification Cards, Tags, and Badges (17 Aug. 1984) [hereinafter, AR 640-3]. AR 40-121, para. 2-2a, refers to the predecessor of AR 640-3, Army Reg. 606-5 (same title) for guidance on dependency determinations.

dependency determinations. For a spouse and legitimate children (including adopted children and stepchildren)] the regulation requires no degree of dependency to establish eligibility for medical care.[191] Illegitimate children of male members for whom paternity has been judicially established have an automatic entitlement to medical care as well.[192]

Other illegitimate children require proof of dependency. While the local installation personnel officer or identification card issuing officer can verify relationship or dependency for most dependents, applications for illegitimate children without a judicial decree must be sent to the Commander] USAFAC, for approval.[193] Applicants must provide a birth certificate and detailed information about the child's expenses and support.[194]

Although local installation personnel can verify eligibility for illegitimate children of male members where paternity has been judicially determined] the sponsor must provide several important documents. In addition to a birth certificate (also required for legitimate children and illegitimate children of female members), the sponsor must provide a copy of the court decree establishing paternity or ordering support.[195]

The eligibility scheme of AR 40-121 is similar to the one upheld in *Mathews v. Lucas.* It presumes dependency for legitimate children and illegitimate children whose paternity is judicially determined. The regulation differs, however, in the extent to which it is "carefully tuned to alternative considerations." The Social Security statute in *Mathews v. Lucas* included as beneficiaries those children with whom the father lived or for whom he contributed support.[196] The regulation requires the illegitimate child to meet both of these criteria and also requires support over fifty percent. By doing so, it becomes less "carefully tuned" than the statute upheld in *Muthews v. Lucas.* It excludes illegitimate children who receive more than fifty percent

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[191]AR 640-3, para. 3-3a. "The mere existence of the relationship establishes eligibility of these dependents for medical care." *Id.*

[192]*Id.* para. 3-3b. Illegitimate children of female members are not mentioned in para. 3-3, but the regulation as a whole and the authority of DOD Instr. 1000.13makes these children automatically eligible.

[193]*Id.* para. 3-17. The Commander, **USAFAC** also must approve eligibility in cases where a relationship is doubtful and for rare cases such as for the illegitimate children of a male spouse of a female member. ***Id.*** para. 1-4f(4), table 3-1.

[194]*Id.* para. 3-17.

[195]*Id.* para. 3-15b(8).

[196]*See supra* note 34 and accompanying text.

of their support from their father but who do not live with him. It also excludes children who may have lived with their father for a significant period of time and whose residence with him was interrupted only by reason of his military service.

The "lived with" eligibility requirement is similar to the one in the Civil Service Retirement Act discussed in *United States v. Clark*.[197] The Supreme Court interpreted that statute as including children who had lived with the deceased federal worker during a period prior to his death. Congress also revised the statute in *United States v. Clark* to eliminate its fifty percent dependency requirement. It did so to avoid discrimination against female civil servants, who frequently did not contribute over fifty percent of the household income. The military eliminated the fifty percent support requirement for female soldiers to receive BAQ on behalf of husbands as a result of *Frontiero v. Richardson*.[198] Because Congress has not changed 10 U.S.C. section 1072 in response to *Miller v. Laird*, it may be proper for the Department of Defense to change its requirements in the same way Congress made changes to the Civil Service Retirement Act. A revision could make eligible those illegitimate children with whom the soldier lives or has lived for a significant period. It also would authorize care for illegitimate children for whom the soldier has provided support commensurate with his ability to do so.

The fifty-percent dependency requirement is particularly harsh because children who are ill may have unusually high expenses—the soldier, therefore, would find it very difficult to meet the fifty percent support requirement. This mechanism would be fairer if it contained a provision like that found in the Pay Manual[199]—that the support requirement is met if the soldier pays his BAQ amount, even if this falls below the required percentage. At a minimum, AR 40-121 should be revised to separate the requirements of residency and support so a child can qualify under either category.

The present system distinguishes between unwed fathers and unwed mothers because the illegitimate children of the unwed service member-mothers qualify for medical care regardless of the support amount or of whether they live with the service member. The validity of this distinction depends on whether the men and women involved are similarly situated. The principle difference for purposes of con-

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[197] *See supra* notes 50-53 and accompanying **text.**
[198] 411 U.S. 677 (1973).
[199] Pay Manual, para. 30238c.

stitutional analysis is that the identity of unwed mothers seldom is unknown.[200] The government's goal probably is to avoid problems of proof. The regulation is too broad in its furtherance of this goal because it eliminates from eligibility many illegitimate children whose parentage is not in doubt.

The system also distinguishes between illegitimate and legitimate children. Legitimate children of divorced parents are eligible for medical care regardless of the percentage of support they receive and regardless of whether they live with the soldier.[201] Although this classification is so overbroad as to include many nondependent children, the Department of Defense supports its continuation "because there is no potential for abuse by unauthorized persons."[202] This is simply another way of saying that illegitimate children must show actual dependency, while legitimate children do not.

The medical care eligibility requirements do not provide the soldier the chance to qualify his child simply by written acknowledgment.[203] Requiring a soldier to initiate a formal filiation proceeding in a state court may be too expensive an option to represent a voluntary entitlement mechanism that would bolster the constitutionality of the system. This is especially so given the peculiar disadvantage soldiers have in the conduct of civil actions while they are in remote locations.

Both the medical care and BAQ benefit schemes contain a mechanism for case-by-case determinations of dependency by USAFAC. The existence of this mechanism and the fact that all dependents or relationships require periodic recertification all but eliminate a government argument that broad classes of illegitimate children must be eliminated to avoid the expense of case-by-case determinations. This is especially so because *Mathews v. Lucas* allows a government agency to presume dependency for large numbers of beneficiaries, even if the presumption is overbroad.

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[200] *See, e.g., supra* notes 64-66 and accompanying text.

[201] AR 640-3, para. 3-3a.

[202] Letter, Deputy Assistant Secretary of Defense. Resource Management and Support, subject: Dependency, at 3, 27 Oct. 1989.

[203] The recent Department of Defense review mistakenly assumed that soldiers *did* have this option with respect to medical care for illegitimate children. *Id.* at Encl. 3.

D. FAMILY SUPPORT

Army Regulation 608-99[204] sets out minimum requirements for soldiers' support of their family members. It also sets out policy and procedures to process paternity claims against soldiers. The regulation incorporates BAQ amounts, but the actual receipt of BAQ or entitlement to it has no relation to the support requirements.[205]

The regulation requires soldiers to comply with financial support provisions of court orders.[206] When no court order exists, the regulation requires soldiers to comply with the financial support provisions of a written support agreement.[207] In the absence of a court order or a written support agreement, AR 608-99 requires minimum support of family members in an amount equal to the soldier's BAQ at the "with dependents" rate.[208]

The regulation defines ''written support agreements" as being between spouses or former spouses.[209] The definition would not include a written support agreement between a mother of an illegitimate child and the child's father, even though the father might be eligible to receive BAQ on the child's behalf because of the existence of voluntary support.

For the purposes of interim minimum support,[210] AR 608-99 defines "family member" to include a present spouse and legitimate minor children.[211] The definition also includes minor illegitimate children born to female soldiers and to male soldiers when evidenced by a decree of paternity identifying the soldier as the father and ordering the soldier to pay support.[212] Consequently, the regulation does not require support for illegitimate children in the interim period before a court issues a support order.

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[204]Army Reg. 608-99, Personal Affairs: Family Support, Child Custody, and Paternity (22 May 1987) [hereinafter AR 608-99].

[205]*Id.* paras. 1-8, 7-4. BAQ is based on federal law; the legal obligation to support dependents almost always is based on state law. ***See*** Arquilla, *Family* ***Support, Child*** *Custody, and Paternity,* 112 Mil. L. Rev. 17, 26-27 (1986).

[206]AR 608-99, para. 2-4a(1). This applies only to court orders requiring support on a periodic basis. The regulation gives commanders the responsibility to ensure that soldiers comply with other financial support provisions as well. This would include provisions for property division and payment of medical expenses. ***Id.*** para. 2-3c(1).

[207]*Id.* paras. 2-4a(2), 2-3b.

[208]*Id.* para. 2-4a(3).

[209]*Id.* Glossary. "Any written agreement *between husband and* wife in which the amount of periodic financial support to be provided by the soldier spouse has been agreed to by the parties." *Id.* (emphasis added).

[210]*See supra* note 208 and accompanying text.

[211]*Id.*

[212]*Id.*

Thus, AR 608-99 requires male soldiers to support illegitimate children only when a court order of support exists. No support requirement exists when a court has entered an order of filiation without a monetary support provision, and the regulation does not enforce the provisions of written agreements between unmarried people. Finally, illegitimate children of male soldiers are not included in the interim requirements, even when the soldier has acknowledged the child as his own.

The effect of these provisions is to deny illegitimate children a right to support that is provided to legitimate children. This is similar to the judicially enforceable right to support that Texas denied to illegitimate children in *Gomez v. Perez*.[213] The mandatory support provisions of AR 608-99 are similar to judicially enforceable rights, and in some ways they are much more practical. Based on *Gomez*, the Supreme Court might hold that once the Army posits a right to enforce support from parents, its denial of that right to illegitimate children violates the equal protection clause of the fourteenth amendment.

The family support regulation is especially vulnerable to constitutional challenge because of its refusal to enforce the provisions of written support agreements. No problems of proof exist in this area, and the agreement between unmarried persons is no different than an agreement between married, divorced, or separated persons.

Army Regulation 608-99 also gives commanders guidance on how to inform soldiers of paternity claims against them and how to advise these soldiers of their legal obligations.[214] The commander informs the soldier of the potential consequences of refusing to comply with a court order of support.[215] The commander then gives the soldier the opportunity to sign a statement admitting or denying the claim.[216]

If the soldier does not agree to provide financial support to the child,[217] the commander will notify the claimant or her representative

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[213] *See supra* notes 29-30 and accompanying text.

[214] AR 608-99, paras. 3-1 through 3-4. The regulation also instructs the commander on how to proceed if there are allegations of an offense such as rape or indecent act with a minor. *Id.* para. 3-2a.

[215] *Id.* para. 3-2b(4).

[216] *Id.* para. 3-2b(5).

[217] *Id.* para. 3-3a. This includes soldiers who refuse to answer questions about the paternity claim, soldiers who deny paternity, and soldiers who admit paternity but refuse to provide financial support.

that no action can be taken on the claim in the absence of a court order.[218] The Department of the Army has resisted pressure to require support in cases in which the soldier simply admits paternity or voluntarily provides support and then ceases to do so.[219]

If the soldier admits paternity and agrees to provide financial support, the commander will assist the soldier in filing for an allotment, applying for BAQ, and obtaining an identification card for the child.[220] The commander also will ask the mother or her representative for a copy of the child's birth certificate.[221] The regulation provides little practical guidance to the commander about the peculiar problems the soldier will face in applying for BAQ and for an identification card for the child. At the very least, the commander would want to mention in the correspondence with the claimant the need for information about the child's support requirements and assets.[222] Naturally, the commander would not want to give the soldier misleading information or cause him to be overly optimistic.[223]

Having the commander ask a soldier to sign an admission of paternity is unwise, unless he is doing so solely to expedite a paternity action. Under the present regulatory system, the soldier might do this to avoid the problems associated with getting benefits for illegitimate children or allowances on their behalf. The best person, however, to advise the soldier about how to respond to a paternity claim is a legal assistance attorney.

The regulation also should contain guidance for commanders and military medical facilities about how to respond to requests for blood tests. Again, the involvement of a legal assistance officer is essential to inform the soldier of the significance of the paternity test in the jurisdiction from which it came.

Finally, the legal assistance officer should inform the soldier of the steps to take to assert his parental rights with regard to his child in light of *Cuban* and *Lehr.*

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[218] *Id.* paras. 3-3a(2), 3-3b.
[219] Arquilla, *supra* note 205, at 54.
[220] AR 608-99, para. 3-3c.
[221] *Id.* para. 3-3c(1).
[222] *See supra* note 132 and accompanying text.
[223] For instance, AR 608-99 advises the commander that an Identification Card application *may* require a birth certificate. AR 640-3, para. 3-15, clearly ***requires*** a birth certificate.

Under a previous version of AR 608-99,[224] the commander would ask if the soldier was willing to marry the complainant. If he was, the commander would contact the complainant and ask if she was willing to marry the soldier.[225]

The current regulation removes the commander from the role of marriage broker, but retains a focus on the soldier's "moral" obligation and his "intentions."[226] The new regulation still states that the commander will "[a]llow the soldier to take ordinary leave in order to marry the claimant, if leave is requested for that purpose."[227] Tacit in this language is the idea that the best way to respond to a paternity claim is for the soldier to "do the honorable thing" and marry the mother. The reduction in the regulation's emphasis on this approach may reflect a growing awareness on the part of its drafters of the changing structure of American family life.

IV. CONCLUSION

Government planners have struggled for many years with the question of how entitlement to military benefits is related to dependency.[228] In part, this struggle exists because dependency is defined in different ways and its existence can be difficult to establish.[229] Given dependency as a criteria, at least some individuals must be presumed dependents to promote administrative convenience. Inevitably, this presumption is denied to some persons who truly are dependent.

The National Defense Authorization Act, Fiscal Year 1989,[230] directed the Department of Defense to review the various rights and privileges provided by law to relatives of members of the uniformed forces and determine the desirability of providing a more uniform and consistent definition of the term "dependent." Although it recommended minor changes,[231] the Defense Department concluded

[224] Army Reg. 608-99, Support of Dependents, Paternity, and Related Adoption Proceedings (15 Nov. 1978).

[225] *Id.* paras. 3-2c, 3-3a. For a comparison of this regulation and the 1985 version, see Arquilla, *supra* note 205, at 52-54.

[226] AR 608-99 (22 May 1987). paras. 3-1b, 3-2b(5).

[227] *Id.* para. 3-3c(6).

[228] *See* The President's Commission on Veterans' Pensions, Veterans' Benefits in the United States (1956).

[229] *Id.* at 220-21.

[230] Pub. L. No. 100-456, § 654, 1988 U.S. Code Cong. & Admin News (102 Stat) 2503. 2546.

[231] The Department recommended that unwed mothers no longer be required to provide a written admission of parentage. Letter, Deputy Assistant Secretary of Defense, Resource Management and Support, subject: Dependency. at 2, 27 Oct. 1989 [hereinafter DOD Letter].

ed that valid reasons exist for the differences in definitions and requirements in the various statutes and directives involved.[232]

The review concluded that it would be "impractical and prohibitively costly to attempt to employ a universal definition of dependent to fill all circumstances."[233] In part, this increased cost would result from extending benefits to newly eligible dependents. It also would reduce many current entitlements and would impair retention.

The review did not approach the various statutes and directives from the point of view of fairness or equity for illegitimate children, nor did Congress intend such a focus. The review points out, however, that "[t]he bottom line of the military pay and benefits package is to recruit and retain military members, not to serve broader societal or welfare functions."[234]

In examining the military benefits scheme as it affects illegitimate children, we need to look beyond its constitutional validity. In considering how a requirement affects morale and retention, we need to look at how fair the requirement is. In looking at the "fairness" of the support requirements, we examine them more closely than would the Supreme Court.

We properly may go beyond constitutional jurisprudence in compensating for such factors as the benefit scheme's disproportionate impact on black soldiers. Such a concern should be greater because minority members currently are represented in disproportionate numbers in the military. A focus on morale and retention also would require us to take into account the extent to which parents of illegitimate children are found in the lower enlisted ranks.

We must ask two questions of the military benefits scheme: First, is the scheme's treatment of illegitimates constitutional? And second, do the eligibility criteria adversely affect morale and retention?

In the case of BAQ entitlement, the different support levels required for illegitimate children compared to those for adopted children or stepchildren appear unjustifiable and unconstitutional. On the other hand, the administrative hurdles placed in the path

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[232]The review also included the definition of dependents found in the Internal Revenue Code, 26 U.S.C. §§ 151-152 (1988).

[233]DOD Letter, *supra* note 231, at 4.

[234]*Id.*

of parents applying for BAQ on the basis of illegitimate children may be constitutional as a scheme designed to examine applications when problems of proof are expected. These administrative hurdles probably are bad for morale, especially for lower ranking enlisted soldiers.

In a similar sense, AR 608-99's failure to provide for the enforcement of written support agreements between unmarried parents denies the illegitimate children of those parents equal protection. On the other hand, that regulation's handling of paternity claims is constitutional, but should be revised to ease the impact of these claims on the soldiers involved.

No major constitutional defects exist in the veterans' benefit system. Nevertheless, the system could be made fairer by including a "catchall" category of eligible children in the SGLI statute. The benefit scheme also would be fairer if it provided support to illegitimate children when the veteran is survived by a spouse.

The medical benefit scheme should be revised to separate its "lived with" and "level of support" requirements so that an illegitimate child can qualify under either category. Although constitutional analysis requires at least this much, morale and retention would be enhanced by making the residency and support requirements more flexible.

An ideal system for determining eligibility for military benefits would require a specific showing of dependency for *all* dependents, regardless of their legal status. Illegitimate children would qualify as dependents as soon as their parents had taken the minimal steps necessary to establish a significant relationship with them, as required in *Stanley* and its progeny. But such relationships can be difficult to establish without limiting proof to objective criteria, and case-by-case determinations for all dependents would be too expensive and time-consuming to use for the armed forces. We are left, therefore, with our present system of presumptions, which we must carefully tune for alternative considerations.

With the decisions of the Supreme Court as a guide and an additional focus on morale and retention, we can and should revise the benefit scheme for illegitimate children to be more consistent and more equitable.

EXPLORING THE LABYRINTH: CURRENT ISSUES UNDER THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

by Lieutenant Colonel Jeffrey S. Guilford*

I. INTRODUCTION

Born in the firestorm sparked by the *McCarty v. McCarty*[1] decision, no one was surprised when the Uniformed Services Former Spouses' Protection Act[2] (the Act) ignited bitter debate and unending controversy. What has been surprising, however, is the degree of complexity the Act has injected into family law. This complexity springs in part from Congress's attempt to overlay a new and uniform pattern of federal law on top of the rich diversity of family law in the fifty states. The complexity also flows from the confusing nature of military retired pay and other benefits afforded to members of the armed forces and their families.

Regardless of its source, however, the complexity can trap attorneys who only occasionally represent members of the armed forces and their spouses. This article examines how practitioners and courts have grappled with some of the more perplexing issues that spring from efforts to harmonize the Act, the nature of military retired pay, and state law. It also identifies pitfalls that can arise in handling military divorce cases. The inquiry begins with a brief review of *McCarty* and the congressional response.

Colonel Richard J. McCarty was an Army physician stationed at the Presidio of San Francisco in the late 1970's. He sought to divorce his wife of twenty years, but he was adamant that the State of California had no authority to award her any interest in his expectancy of military retired pay. The court granted the dissolution, but in consonance with California precedent it also awarded Mrs. McCarty fif-

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[1] 453 U.S. 210 (1981).

[2] Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended in scattered sections of 10 U.S.C.).

ty percent of the retired pay benefits Colonel McCarty had accrued as of the divorce.[3]

Colonel McCarty successfully sought United States Supreme Court review of the California ruling, raising two arguments. First, he asserted that military retired pay cannot be divided as marital property because it is not truly "retired pay" in the civilian sense of the word. Colonel McCarty cited federal precedent establishing that military "retired pay" actually is reduced *current* pay for continued service in the armed forces at a reduced level.[4]

This conclusion about the nature of military retired pay could defeat a spouse's claim to a share of the asset. If it is *current* pay, then it is income the retiree earns from month to month. Under the laws of most states, therefore, it would not constitute marital property subject to division. The spouse would have no more of an interest in this money than he or she would have in active duty pay received after the divorce or in the income a military retiree might earn from a job acquired after the divorce.

What is the basis for this "current pay" theory? As the Court noted, military retirement benefits do not constitute an asset that is earned during employment with payment deferred until retirement (the pattern for civilian pensions). Instead, military retirees continue to serve in a reduced capacity by being on the retired list, subject to recall if their country needs them.[5] In return for this reduced service,[6] they receive reduced monthly pay—military retired pay.

A number of rules concerning military retired pay add weight to the current pay argument. For example, resignation represents the only way to avoid being subject to involuntary recall to active duty, and such a resignation also terminates the military retired pay benefit. Thus, military retired pay can be likened to a retainer that is earned on a month-by-month basis.

Retirees who are recalled to active duty receive full pay and

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[3]California's position was somewhat tenuous, however, after the United States Supreme Court's decision in Hisquierdo v. Hisquierdo. 439 U.S. 572 (1979). In *Hisquierdo,* the Court ruled that states were preempted from employing community property laws to divide federal railroad retirement benefits.

[4]*McCarty,* **453** U.S. at 221.

[5]10 U.S.C. § 688 (1988). Recent events in Southwest Asia demonstrate that this is not merely a possibility.

[6]The notion of "reduced" service arises from a comparison of the service rendered by military retirees and those who are on active duty.

allowances, but not retired pay plus full pay. Compare this to civilian employees who are asked to return to work by former employers for limited periods of time. These people typically receive pay for their current services in addition to their pension.

Two additional aspects of military retired pay support Colonel McCarty's position. Military pensions do not "vest" in the usual sense of the term. They are not assignable] they never have any cash value, and Congress can reduce the amount of retired pay (down to zero) any time it chooses. A change could be prospective only (affecting those who newly enlist) or partially prospective (affecting new enlistees and those who currently serve), or it could be retroactive, reducing or terminating retired pay for those who already have served and retired.

Military retirement benefits also can be reduced, or even terminated, as a result of a postretirement court-martial conviction.[7] This possibility suggests that current honorable service—not past performance—is the foundation for retired pay. Moreover, the very fact that military retirees continue to be subject to the Uniform Code of Military Justice[8] further bolsters the conclusion that military retired pay truly is compensation for current service. It also demonstrates that retirees retain significant military commitments even during periods when they are not called to active duty.

Despite acknowledging the merits of the current pay argument, the Court did not rest its holding on this rationale. Retirees and retiree groups continue to raise the issue, however, when arguing about the divisibility of military retired pay. Their position essentially relies on state law rather than federal law because state law defines what constitutes marital property.

However appealing the retirees' argument seems from a technical standpoint] no appellate decision has agreed not to divide military retired pay because of the "current pay" rationale. Courts seem to have focused more on the similarities between military and civilian pensions than on the technicalities of administration for military retired pay.

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[7] *See* 10 U.S.C. § 1408(a)(4) (1988) (this provision explains how to account for court-martial fines and forfeitures when determining the amount of military retired pay that is subject to division).

[8] *Id.* § 802(4).

The second prong of Colonel McCarty's attack on division of military retired pay rested on the concept of preemption. He asserted that military retirement benefits constitute an integral part of Congress's program to raise and maintain armies. Together with other benefits and personnel management policies, the prospect of military retired pay helps recruit members into the armed forces; it helps induce members to remain in service; and it serves to encourage them to leave active or reserve duty at the end of their career, thus allowing an orderly progression through the ranks and the maintenance of a vigorous fighting force.

Colonel McCarty argued that allowing states to take away a portion of retired pay could frustrate Congress'spurpose in establishing this management tool. The Court agreed. In a six-to-three decision, it ruled that states are preempted from dividing military retirement benefits (the three dissenters argued that the tests for preemption had not been met in this case). The majority concluded by noting that this ruling could adversely affect former military spouses, and it invited Congress to change the result in the interests of fairness.

Congress responded to this call with amazing alacrity. It conducted hearings, prepared reports, and then enacted the Uniformed Services Former Spouses' Protection Act, all in about fifteen months. Some might say Congress acted a little too quickly. Portions of the Act do not account fully for the complexities of military retired pay, and the resulting latent ambiguities have spawned countless disputes. We turn now to some of these disputes.

11. THE DISPOSABLE RETIRED PAY ISSUE

A. TAX WITHHOLDINGS

The key portion of the Act, the part that overrules *McCarty*, provides that "a court may treat *disposable* ***retired.*** *. .pay* either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[9] The Act defines "disposable retired pay" as gross nondisability[10] retired pay minus certain deductions, including deductions for

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[9]14 U.S.C. § 1408(c)(1) (1988) (emphasis added); ***see*** *infra* note *35*.

[10]As initially formulated, the **Act** excluded all military disability retired pay from the term "disposable retired pay." **A** later amendment included a portion of such disability retired pay as disposable retired pay.

various types of debt owed to the federal government; federal, state, and local income tax withholdings; federal employment taxes; life insurance; survivor benefit plan premiums in some cases; statutory offsets required by the retiree's receipt of federal civil service employment benefits; and statutory offsets required by the retiree's receipt of disability benefits from the Department of Veterans' Affairs![11]

This formulation has caused endless problems. State marital property laws generally call for the division of gross retired pay, not an adjusted amount.[12] Moreover, the definition of disposable retired pay has not integrated well with the tax treatment of military retired pay. As a result, the spouse often has received less than state law seems to call for.[13]

States responded to these problems largely by ignoring the Act's plain language. The majority of jurisdictions that considered the matter ruled that they had authority to award a former spouse a share of gross retired pay.[14] The Supreme Court brought a halt to this practice, however, in *Mansell v. Mansell*.[15]

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[11] 32 U.S.C. § 1408(a)(4) **(1988);** ***see*** *infra* note **35.**

[12] *See infra* note **14.**

[13] While Congress recently has amended the definition of "disposable retired pay," it may be helpful to examine why the issue has generated such controversy. Consider a retiree entitled to **$2000** per month, with a former spouse who has been awarded **50%** of the retired pay. Under the law of many states, each would receive $1000. In the simplest case under the Act as originally formulated, however, the disposable retired pay would be $2000, minus federal income tax withholding. The military finance centers would calculate and report tax withholding as if all the income were taxable to the member. This rule applied because, under federal law, the money is current income for current services, rather than an asset to be divided.

Assuming the retiree is in the **15%** tax bracket and has a second job (and attributing the personal and standard deductions to income from the second job), the disposable pay would be **$1700.** Each spouse would get one-half this amount, or **$850.** The retiree actually pays taxes on only **$1150,** while the former spouse would pay taxes on the remaining **$850.** Thus, the retiree receives **$850** each month, plus a tax refund at the end of the year equal to **15%** times **$850** times **12** months, or **$1530.** This works out to a monthly total of **$977.50** (pay plus prorated refund). In the meantime, the former spouse pays taxes **(15%)** on **$850,** leaving a net of **$722.50** per month.

These numbers simplify the tax calculations, but they do illustrate a key problem with the "disposable retired pay" construct. The retiree's "half" is **$977.50** per month, while the former spouse's "half" is only **$722.50.** The other permissible adjustments to gross retired pay in section 1408(a)(4) only further disadvantage the former spouse.

[14] *See, e.g.*, Casas v. Thompson, **42** Cal. **3d 131, 720** P.2d **921,** 228 Cal. Rptr. **33,** ***cert. denied,*** **479** U.S. **1012 (1986);** Deliduka v. Deliduka, **347** N.W.2d *52* (Minn. Ct. App. **1984);** White v. White, **734** P.2d **1283** (N.M. Ct. App. **1987);** Lewis v. Lewis, **350** S.E.2d **587** (N.C. Ct. App. **1986);** Bullock v. Bullock, **354** N.W.2d **904** (N.D. **1984);** Martin v. Martin, **373** S.E.2d **706** (S.C. **1988);** Grier v. Grier, **731** S.W.2d **936** (Tex. **1987);** Butcher v. Butcher, **357** S.E.2d **226** (W.Va. **1987).** ***But see*** Campbell v. Campbell, **474** So. 2d **1339** (La. Ct. App. **1985)** (holding that a state can divide only disposable retired pay).

[15] 490 U.S. **581 (1989);** ***see*** *infra* notes **27-42** and accompanying text.

Although the *Mansell* case dealt with a disability pay question, the Supreme Court had to decide whether the term "disposable retired pay" had to be interpreted in strict conformity with the statutory formulation. Despite arguments about fairness that echoed the rationales for ignoring tax deductions in dividing retired pay, the Court held that state courts can divide only what Congress empowered them to divide— disposable retired pay.[16]

Perhaps in reaction to issues highlighted by *Mansell*, Congress recently alleviated the tax aspect of the disposable retired pay problem.[17] It accomplished this by eliminating tax withholdings as one of the deductions in calculating disposable retired pay.[18]

B. DISABLED MILITARY RETIREES

Disability pay constitutes one of the more troublesome complexities in dividing military retired pay. Disabled military retirees can supplement or supplant military retired pay through benefits under either (or both) of two disability benefit systems.

1. Military Disability Retired Pay

The military disability retired pay system[19] applies to members who are so disabled that they cannot perform their duties. If they have a qualifying amount of service, they may be placed on the disability retired list and begin receiving disability retired pay.

The amount of disability retired pay is based on two formulas.[20] To see how this works, consider a member with sixteen years of service, an active duty base pay of $2000 per month, and a thirty percent disability (thirty percent is the minimum level of disability that qualifies a member for disability retirement). Under the first formula, the member receives a pension based on his or her years of service.

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[16]*Mansell*, 490 U.S. at 595.

[17]National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1568-70 (1990) (amending 10 U.S.C. § 1408(a)(4)); ***see*** *infra* note 35.

[18]In addition, the change limits the types of indebtedness payments to the government which will be deducted to that arising from overpayments of retired pay. This will prevent a retiree from using retired pay deductions for tax indebtedness to offset a portion of a former spouse's share of retired pay. It also eliminates court-martial fines (but not forfeitures) as a deduction in figuring disposable retired pay.

[19]10 U.S.C. §§ 1201-21 (1988). These are the provisions that 10 U.S.C. § 1408(a)(4) refers to when it speaks of benefits paid under chapter 61 of title 10.

[20]***See id.*** § 1401.

This is calculated by multiplying 2.5% times the member's years of service times base pay. In this case, it comes to 2.5% times sixteen years times $2000, or $800. Under the second formula, the member receives an amount based on the degree of disability. This is calculated by multiplying the percentage of disability times the member's base pay. In this case, it is thirty percent times $2000, or $600.

The disabled member receives the higher amount from these formulas.[21] In the example, he or she would receive $800 per month in military disability retired pay. The member's length of service clearly was a factor in arriving at this amount, but all of it is paid as a disability pension.

The military disability retired pay system has serious consequences for a former spouse. As the Act first was formulated, *all* disability retired pay was excluded from "disposal retired pay."[22] Logically, this meant that no portion of a disability pension could be divided. This harsh result may have been alleviated in practice to some extent, however, because courts were not adhering to a strict interpretation of the Act. As noted previously, they did not feel constrained to award only a portion of disposable retired pay.

In 1986,[23] Congress addressed this problem. It amended the Act to eliminate the total exclusion of disability retired pay from the divisibility provision.[24] It also specifically defined a portion of disability pensions as disposable retired pay. Unfortunately for some former spouses, however, the cure is more illusory than real.

The disposable retired pay portion of a disability pension now is calculated by starting with the gross monthly pension payment and then deducting "amounts which. . .are equal to the amount of [disability retired pay] computed using the percentage of the member's disability. . . ."[25] Reconsider the example used above to calculate a

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[21] Disability retirees never fare worse than similarly situated longevity retirees, and in some cases they receive more disability retired pay than their longevity-based pension would yield. Note, however, that the longevity pension cap of 75% of base pay ceiling applies to disability retired pay. *Id.* In both cases, no one can receive more than 75% of base pay regardless of years served and regardless of degree of disability. *Id.* Thus, a service member with a 100% disability and 35 years of service will receive 75% of base pay.

[22] The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1002, 96 Stat. 730 (1982).

[23] Pub. L. No. 99-661, § 644(a), 100 Stat. 3816, 3887 (1986) (codified at 10 U.S.C. § 1408(a)(4) (1988)).

[24] *E.g.*, 10 U.S.C. § 1408(c)(1) (1988).

[25] Pub. L. No. 99-661, § 641, 100 Stat. 3816 (1988) (amending 10 U.S.C. § 1408(a)(4)).

disability pension. The monthly payment is $800, and $600 of this sum is the amount "computed using the percentage of the member's disability." Thus, the disposable retired pay portion is $800 minus $600, or $200.

Even under the revised Act, this $200 defines the outer extent of a court's authority to divide the pension. After *Mansell*, no room exists for selective "interpretations" to ensure a spouse receives a greater share of the pension than may be called for by state law. Absent an agreement between the parties that protects the spouse's interest in the longevity portion of the pension, a spouse who is entitled to fifty percent of the retired pay by state law could receive only $100 out of the member's $800 benefit.[26] Clearly, counsel for a spouse should consider negotiating for a separation agreement provision that protects the spouse's interest in the longevity-based portion of retired pay in the event of a future disability retirement.

2. *Department of Veterans' Affairs Disability Benefits and* Mansell v. Mansell

The Department of Veterans' Affairs (VA) administers a second benefit program for disabled military retirees. An examination of the *Mansell* case illustrates how this program relates to the division of military retired pay.

At the time of his retirement from the Air Force, Major Gerald E. Mansell suffered from a service-connected disability. While the degree of disability was not severe enough to qualify him for military disability retirement, it was significant enough to entitle him to monthly payments from the VA.

To qualify for VA payments, Major Mansell had to waive an equivalent amount of his military retired pay.[27] Nearly all retirees who are eligible to make this election do so, even though they do not enjoy an increase in gross income. Choosing to receive VA benefits nevertheless is financially advantageous because the VA money is

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[26] For a more striking result, consider the situation if the member had a 40% disability (rather than 30%). The longevity calculation would be the same, yielding $800 per month. The disability calculation, however, would be 40% times base pay ($2000), or $800. The member would receive $800 per month, but *none* of it would constitute disposable retired pay. The Act, therefore, forecloses the spouse from receiving any portion of the pension, regardless of the length of the marriage or other equitable factors recognized by state law.

[27] 38 U.S.C. § 3106 (1988).

tax-free,[28] unlike longevity-based military retired pay. Thus, instead of receiving taxable military retired pay of $2000 per month, a retiree with a VA-recognized disability that is evaluated at $800 per month can waive $800 of retired pay and receive a like sum, tax free, from the VA. The total monthly income is unchanged, but only $1200 is taxable after the election.

When Major Mansell and his wife divorced, the California court not only divided his actual retired pay, but also awarded his wife a portion of the money he waived to receive the VA benefit.[29] He challenged this ruling several years later, basing his attack on the Act's definition of ''disposable retired pay." Disposable retired pay excludes any retired pay that is waived to receive VA benefits.[30] Because the waived money is not disposable retired pay, he argued, the court had no authority to divide it.

Consider what Major Mansell sought to accomplish. First, he unilaterally elected to receive VA payments in lieu of retired pay because it was in his financial best interests. He then asserted that the marital asset of retired pay had been reduced in value from $2000 per month to $1200 per month. If the spouse's share was thirty percent, he has reduced her interest from $600 to $360 (and he pockets the **$240** difference). Should he be allowed to defeat state law by shifting money out of retired pay, which is divisible, into VA benefits, which are not?

Apart from legal questions, the parties' positions in this debate are as clear as they are difficult to reconcile. Disabled retirees assert, with some justification, that the VA benefits are compensation for pain and suffering, for lost physical capacity, and for impaired enjoyment of life. These losses are personal losses that continue after the divorce, so no marital interest in the payments exists. In reply, spouses point out that they have an indisputable right under state law to a portion of the retired pay. It cannot be fair, then, to allow the retiree unilaterally to convert this marital asset into property

[28] *Id.* § 3101(a).

[29] It did so, in part at least, because Major Mansell had executed an agreement with his wife that specifically called for a division of this waived pay.

[30] 10 U.S.C. § 1408(a)(4)(B) (1988).

in which the spouse has no interest. No obviously correct answer exists.[31]

The questions raised are not as uncommon as they may appear to be. Actually, California courts already had confronted this very issue. In *In re Daniels*[32] the court ruled that they could divide the waived retired pay when a military retiree elected to receive VA payments.[33] Moreover, the *Casas v. Thompson*[34] decision held that Congress had not intended the Act's "disposable retired pay" language to limit the application of state law in divisions of military retired pay.

After losing in state court, Major Mansell obtained review by the United States Supreme Court. The Court began its decision by reciting the history of *McCarty* and the Uniformed Services Former Spouses' Protection Act. It then framed the *Mansell* issue as one of statutory

[31]The dilemma is created, at least in part, because the VA benefit scheme victimizes military retirees as much as former spouses. To see how this is so, consider two members of the armed forces who suffer similar disabilities in their tenth year of service One leaves service immediately and the other remains on active duty. The civilian begins receiving monthly VA payments. in addition to the earnings of a civilian job. The one who remained on active duty receives only military pay and allowances.

Twenty years later, when both retire from their respective professions (and after the civilian has received 240 tax-free VA disability payments), the one who departed service early is receiving a pension check plus a tax-free VA check each month. The military retiree finally can begin receiving VA disability pay, but only if he or she waives a portion of the military pension that was earned through :30 years of service. In reality. the military retiree never receives a VA disability payment at all; the only real benefit is the opportunity to shelter a portion of the earned pension from taxes.

[32]186 Cal. App. 3d 1084, 231 Cal. Rptr. 169 (Cal. Ct. App. 1986).

[33]Of course, receiving an award for a share of the waived money and enforcing the award are two different issues. The money is not paid to the retiree, so the spouse's share cannot be collected from the military finance center. Moreover, VA benefits generally cannot be attached. ***See*** 38 U.S.C. § 3101 (1988). *But see* 42 U.S.C. §§ 659, 662(f)(2) (1988) (allowing garnishment of VA payments received in lieu of military retired pay in order to enforce family support obligations).

[34]42 Cal. App. 3d 131. 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*. 479 U.S. 1012 (1986).

interpretation—specifically, interpretation of section 1408(c)(1).[35] It noted that the Act's formulation "affirmatively grants state courts the power to divide military retired pay, yet its language is both

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[35]The full text of the provision is as follows:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(1) (1988). The key term is "disposable retired pay," which is defined in 10 U.S.C. § 1408(a)(4) (1988). At the time of the ***Mansell*** decision, it stated:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which—
>
> (A) are owed by that member to the United States;
>
> (B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;
>
> (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he is entitled.
>
> (D) are withheld under section 3402(i) of the Internal Revenue Code of 1986 (26 lJ.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;
>
> (E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (F) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1452] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

Congress amended section 1408(a)(4) in 1990. The revised version reads as follows:

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—
>
> **(A)** are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title ***5*** or title 38;
>
> (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (D) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1452] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1568-70 (1990) (to be codified at 10 U.S.C. § 1408(a)(4).

precise and limited.''[36] The Court went on to conclude that "under [the Act's]plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as community property.''[37]

In view of the clear legislative mandate against her position, Mrs. Mansell could prevail only by showing that a literal reading of the statute would thwart the Act's "obvious purposes.''[38] She unsuccessfully sought to meet this test by arguing that the Act's purpose was to restore to state courts the unfettered authority over retired pay they had before the *McCarty* decision. The Court rejected her effort, however, because congressional reports, as well as the language of the statute itself, are inconsistent as to the general purpose. The Court found that the legislative history failed to explain why Congress chose language that subjects some portions of retired pay to division while sheltering other portions.[39] This gap makes it impossible to identify any "obvious purposes" that would be hindered by a literal reading.")

Thus, the Court ruled that states are preempted from dividing money that a military retiree has waived to receive VA disability payments.[41] In a conclusion reminiscent of *McCarty*, the Court observed that

> reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.[42]

The *Mansell* case and its aftermath shed a great deal of light on disposable retired pay issues. The Court eschewed the opportunity to take the initiative in resolving inequalities caused by the interaction of sections 1408(c)(1) and 1408(a)(4), just as it avoided the chance

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[36]*Mansell*, 490 U.S. at 588.
[37]*Id.* at 589.
[38]*Id.* at 592.
[39]*Id.*
[40]*Id.* at 594.
[41]*Id.*
[42]*Id.*

to address the perceived inequities created by the *McCarty* ruling. Thus, the responsibility for corrections in the scheme to divide military retired pay rests squarely with Congress.

B. PRERETIREMENT PAYMENTS

Like their civilian counterparts, members of the armed forces often remain in service after they become eligible for retirement. A deferral of the retirement decision affects former spouses in two ways: it increases the amount of retired pay (and usually the amount of the former spouse's monthly check) when the member does retire, and it delays receipt of the retired pay benefit for the spouse as well as the member.

Several courts have examined the equities of this situation, and they generally have found the spouse to be disadvantaged unfairly by the delay.[43] Indeed, in the military setting, the former spouse usually maximizes lifetime retired pay income if the member retires immediately upon eligibility. As a rule, a member's decision to delay retirement serves to diminish the spouse's overall benefit.[44]

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[43] *See e.g.*, Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (policeman); *In re* Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal Rptr. 493 (1981) (civilian pension); In *re* Luciano, 104 Cal. App. 956, 164 Cal. Rptr. 93 (1980) (member of the armed forces); Wallace v. Wallace, 677 P.2d 966 (Haw. Ct. App. 1984) (Public Health Service employee); Gemma v. Gemma, 778 P.2d 429 (Nev. 1989) (policeman). See *also* Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (instead of ordering the employee to retire in order to protect the former spouse's interest in a union pension, the trial court should have given the employed spouse the option of continuing working and paying the spouse her share of the pension benefits he would have received); Mattox v. Mattox, 734 P.2d 259 (N.M. Ct. App. 1987) (affirmed the use of the employee's retirement eligibility date, as opposed to a later projected retirement date, in calculating the current value of the pension).

[44] This diminution occurs even though the amount of monthly retired pay increases as the member remains on duty. Military retired pay is set as a percentage of the member's base pay. Increases for service beyond 20 years arise because: the member's retired pay starts at 50% of base pay and increases an additional 2.5% of base pay for each year of service beyond 20, up to a maximum of 75% (note, however, that these calculations will become much more complex in future years as Congress's prospective changes in military retired pay take effect); the member may be promoted during the period of extended service, resulting in a higher base pay; the member may receive longevity pay increases during the extended period of service, resulting in a higher base pay; and the member usually will receive cost of living increases to base pay during the extended period of service.

The time value of money is one of the key reasons that the value of the spouse's interest in the retired pay benefit shrinks. That is, $1000 per month, with payments beginning immediately, may be worth more than a $1200 benefit that will not start for 5 or 10 years. The increased monthly income in the future may not adequately compensate for the lost use of the lesser amount over a period of years.

Coverture calculations also have an adverse effect on the spouse when the member delays retirement. The "coverture fraction" is a ratio that determines the portion of retired pay that was earned during the marriage. For example, suppose a spouse was

Should the member be entitled to make a unilateral retirement decision that impacts on a marital asset and has serious financial consequences for the former spouse? California courts have issued what appear to be the leading opinions on this issue.[45] They hold that the former spouse has a right to elect to begin receiving a share of the retired pay benefit when the employed spouse becomes eligible for retirement, whether or not he or she actually retires at that point. Alternatively, the spouse can postpone the election to any point in time he or she chooses, up to the date the employed spouse actually retires. Thus, the former spouse can seek to maximize the value of his or her interest based on the health of the parties, the nature of the employed spouse's retirement plan, the employed spouse's prospects for promotion, and other factors.[46] The only catch is that the election locks the spouse in to the value of the retirement benefit at the time of election. He or she cannot share in any subsequent increase in the employed spouse's retirement benefit that is attributable to post election promotions or continued service beyond the election date (although the former spouse does share in cost of living increases).

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married to a member for 10 years and the member was on active duty during this entire time. If the member retires at the 20-year mark, then one-half the retired pay is a marital asset because it was earned during the marriage. The spouse generally would receive one-half the marital interest in the retired pay, which here would amount to 25% of the retired pay.

Now suppose that the member remains on active duty for 30 years. The same 10-year marriage now constitutes only one-third of the total period of service, and therefore the marital interest is only 33% of the retired pay. The spouse would get one-half of the marital share. or 16.66% of the retired pay.

The retired pay benefit usually increases in value during the period of extended duty enough so that, on a monthly basis, the spouse comes out ahead. That is, 16.66% of a 30-year retirement usually is more than 25% of a 20-year retirement. The former spouse still is disadvantaged, however. Both the former spouse and the retiree usually must live a very long time after retirement for the spouse to recoup the 10 years of lost income plus interest on that income.

Finally, the spouse's interest is reduced on an actuarial basis as well as a real dollar basis. The member's military retired pay benefit never vests, and neither does the former spouse's interest. Thus, if the member dies during the period of service beyond 20 years, the former spouse is foreclosed from receiving any retired pay benefit. Of course, if the former spouse dies during the period of extended service he or she receives nothing. Moreover, under the provisions of 10 U.S.C. § 1408(c)(2), the spouse's heirs and assigns are not entitled to receive what would have been the spouse's share.

[45] *In re* Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal Rptr. 493 (1981) (civilian pension); *In re* Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) (military pension).

[46] Arizona goes one step further. Its courts have ruled that the spouse *must* begin receiving his or her share when the employed spouse becomes retirement eligible; there is no opportunity to elect a different time to begin receiving the benefit. Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986).

Funding for an election to receive a share of retired pay before the service member actually retires can be a problem. Civilian pension plans may be able to handle the mathematics and pay the money directly to the former spouse even though the employed spouse remains on the payroll. No "retirement fund'' for the military exists to facilitate this approach, however. Under the California approach, a member who remained on active duty past retirement eligibility would have to pay a former spouse his or her share of "retired pay" directly out of the member's current income. Understandably, this prospect has drawn some criticism from divorced members who wish to stay on active duty.

The whole issue may be moot, however. *Mansell* teaches that states can divide only disposable retired pay, and this term does not include the expectancy of retired pay. Thus, states probably are preempted from applying marital property laws to military pensions in a manner that requires payment of a property interest before the member actually retires.

On the other hand, the parties could agree that the spouse should begin receiving some portion of the retired pay asset before the member actually retires. Counsel who negotiate such agreements on behalf of the soon-to-be former spouse should ensure that any court order that incorporates the requirement also makes it clear that the parties voluntarily have agreed to this provision. **If** the issue is not clarified, the order could be subject to an attack on the basis that it exceeds the court's authority under federal law.

C. CIVIL SERVICE PENSIONS

Military retirees often begin a second federal civil service career after their military service is concluded. This can have a significant effect on a former spouse who is entitled to receive a share of military retired pay. For example, officers commissioned in a regular component of the armed forces forfeit a portion of their military retired pay when they begin receiving pay as a federal civilian employee.

Another situation arises if the retiree is employed as a civil servant long enough to accrue retirement benefits. Upon reaching the second point of retirement eligibility, he or she can choose how to handle the military pension. The retiree can receive two pension checks, one based on military service and one based on civilian employment. Alternatively, he or she can elect to combine the

periods of military service and civilian employment and receive one pension check that will exceed the amount of the two separate checks.[47] This election, however, extinguishes the military retired pay.[48]

Although no case law directly on point exists, ***Mansell*** seems to say that a former spouse has no claim to retired pay that is waived to receive civil service pay or a civil service pension because waived pay is excluded from disposable retired pay.[49] Therefore, counsel for a spouse should address the possibilities of civilian employment (in appropriate cases) and a combined pension (in perhaps all cases) in separation agreement provisions that preserve the spouse's interests.

In a similar vein, members who face divorce and a division of prospective retired pay relatively early in their military careers have a significant incentive to leave military service. Federal civil service may present an especially attractive alternative because the time spent in the military can be used in eventually qualifying for a civil service pension. Again, counsel for a spouse should be alert to this possibility. As a routine matter, the spouse should insist on a settlement provision that preserves an interest in *any* retirement plan that gives credit for military service that occurred during the marriage. This will serve to protect the spouse's interest and may reduce the incentive to leave military service.

In summary, the Act's continued reliance on the term "disposable retired pay" still presents problems from the former spouses' perspective. Congress has addressed the recurrent tax problem by redefining "disposable retired pay," but it has failed to remedy the VA benefit issue that was the core of the *Mansell* case. This inaction is especially curious in light of the Court's express invitation for Congress to review the issue. Additionally, despite two amendments to the disposable retired pay formulation, Congress also has left intact a military disability retired pay scheme that can defeat a former spouse's interest in a military pension.

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[47] *See* Congressional Research Service, ***Federal Civil Service Retirement for People With Military Service and Social Security: "Catch 62,"*** Report No. 84-680 EPW (July 24, 1984).

[48] *Id.* **Note** also that 10 U.S.C. § 1408(a)(4) addresses this point by excluding from disposable retired pay any amount waived to receive benefits under title 5, U.S.C. ***See supra*** note ***35.*** Title 5 includes civil service pension provisions

[49] 10 U.S.C. § 1408(a)(4) (1988).

At present, only one way exists to ensure that a former spouse receives the benefits that are created under state marital property laws. Counsel must identify actual and potential issues that hinge on the definition of disposable retired pay and then negotiate appropriate provisions in a separation agreement.

III. JURISDICTION TO DIVIDE MILITARY RETIRED PAY

In addition to limiting the effect of state substantive law on the division of military retired pay, Congress also prescribed jurisdictional constraints on a court's authority even to address the issue. The Act notes:

> A court may not treat the disposable retired or retainer pay of a member [as marital or community property] unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.[50]

1. Bases for Exercising Jurisdiction over Military Retired Pay

Although the statutory jurisdictional provisions have not been particularly controversial, they appear to have caught some practitioners off guard. After all, who would suspect that federal law might circumscribe the authority of the local family law court in divorce cases?

Despite liberal "interpretations" of their powers under other provisions of the Act, courts have applied these jurisdictional limitations in a straightforward manner. For example, a California court declined to exercise jurisdiction in a case lacking the statutory prerequisites, even though sufficient "minimum contacts" existed between the

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[50] *Id.* § 1408(a)(1). In addition, the Act defines the term "court" to include:
(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;
(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and
(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.
Id. Section 1408(a)(1)(c) effectively is inoperative because the United States has not entered into any such treaty with any country.

state and the retiree, who was a former domiciliary.[51] Following the same trend, Minnesota ruled that the Act preempts the state long-arm statute.[52]

Case law reflects two recurring jurisdictional questions. The first asks what type of "consent" by the member is necessary to confer authority to divide military retired pay as marital property? The courts appear to be unanimous in holding that consent to the court's jurisdiction in the form of a general appearance is sufficient." The court need not obtain the member's express consent to divide the retired pay.[54]

The second issue turns on the notion of continuing jurisdiction. Can a court employ this concept to divide retired pay as marital property after the divorce is completed? The answer appears to be in the affirmative,[55] but a pitfall exists.

At least for purposes of fitting actions into the constraints imposed by the Act, continuing jurisdiction only applies to subsequent proceedings in the original case. Thus, a court can reopen a divorce decree to consider a partition of military retired pay.[56] It cannot, however, entertain a new partition action to achieve the same goal unless one of the statutory tests is met when the new action is commenced.[57]

Somewhat surprisingly, no case law explores the language concerning being present in the state "other than because of military orders." This formulation could be fertile ground for litigation. Consider, for example, a member who explicitly requests an assignment in a specific state for personal reasons. Is he or she a resident "other than because of military assignment?"

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[51] *In re* Hattis, 196 Cal. App. **3d** 1162, 242 Cal. Rptr. 410 (1987).
[52] Mortenson v. Mortenson. 409 N.W.2d 20 (Minn. Ct. App. 1987).
[53] *E.g.*, Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).
[54] *Id.*
[55] *E.g.*, McDonough v. McDonough, 184 Cal. App. **3d** 45, 227 Cal. Rptr. 872 (1986); Burngardner v. Burngardner, 421 So. 2d 668 (La. Ct. App. 1988).
[56] *See* cases cited *supra* note **55.**
[57] *E.g.*, Tarvin v. Tarvin, 187 Cal. App. 3d, 232 Cal. Rptr. 13(1986). ***See*** *also* Carmody v. Secretary of the Navy, 886 F.2d 678 (4th Cir. 1989)(an order dividing military retired pay that resulted from a new partition action, unrelated to the original divorce decree. is invalid for purposes of seeking direct payment of the spousal share).

2. Consequences of the Jurisdictional Rules

One can become distracted by the Act's jurisdictional rules and lose sight of the question of when they apply. The Act only limits a court's authority to divide military retired pay as marital property. The court can grant a divorce, divide other marital assets, award a spouse maintenance or alimony, determine child custody and support issues, and do anything else permitted by state law without any regard to the Act. The court can order that alimony and child payments be paid out of military retired pay, even without meeting the Act's jurisdictional requirements.[58]

On the other hand, case law suggests that most divisions of military retired pay are predicated on marital property concepts. The Act's jurisdictional limitations appear to be based on a concern that spouses might engage in forum shopping to maximize an award of military retired pay. Certainly, the peripatetic nature of military service creates some risk that this could happen, and the Act's provisions seem to provide adequate protection for the member.

But are they fair for the spouse? Room for debate exists here. Suppose a resident of Virginia joins the Army, completes training, and is stationed in Texas. He meets a local woman and marries her. Every few years he is reassigned, and in the course of his career in the armor branch he is stationed in Texas more than in any other state. After eighteen years, and while he is assigned in Texas again, his wife decides that she must obtain a divorce due to mental and physical abuse.

Texas can grant the divorce, but can it divide the retired pay as marital property? Assuming he has not adopted Texas as his state of domicile, the answer is "no"—at least not without his consent. If he withholds consent, what options does his wife have?

She could seek an alimony order instead of a share of retired pay, but Texas law limits its courts' authority to grant alimony. Moreover, even if this option were available, alimony has restrictions that property divisions avoid, such as termination upon remarriage.

She could explore initiating a divorce in Virginia, where he is domiciled. She would encounter problems, however, because Virginia would require her to reside in the state for six months prior to commencing the action.

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[58] *See* 10 U.S.C. § 1408(a)(2), (c)(4), (d)(1) (1988).

In desperation, she might initiate a divorce in Texas and then follow it up with a partition action in Virginia to divide the retired pay. Virginia would have jurisdiction under federal law, but does state law create a cause of action for dividing marital property other than pursuant to a divorce action? In some states, this is impossible.

Even assuming she gets a partition order from Virginia, she will have enforcement problems. She will not be able to obtain her share of retired pay directly[59] from the finance center because a bare partition award is not a qualifying "court order" under the Act.[60] Thus, if the retiree fails to pay her a share of the retired pay in accordance with such an order, the spouse must rely on possible remedies under state law, such as attachments of the retiree's property.

For all practical purposes, she has no adequate means of protecting her interest in the retired pay asset that she has helped accumulate. Given the current formulation of the Act, coupled with typical restrictions on courts' authority to grant divorces when neither party resides in the state, many spouses could find themselves in this situation. Their choices are limited: try to establish that the member has changed domicile to the state where the spouse is residing; relocate to the member's state of domicile and initiate an action there; develop negotiating strategies that will lead the member to consent to an action in the local court; settle for an award of alimony; obtain a partition order that may be unenforceable; or forego sharing in the retired pay benefit.

IV. SURVIVOR BENEFIT PLAN ISSUES

A. OVERVIEW

The Survivor Benefit Plan (SBP) is an annuity that allows retired members of the armed forces (both active duty and Reserve components) to provide continued income for designated beneficiaries after the retiree's death.[61] SBP participation is voluntary, but in most cases a married member on active duty cannot opt out of the program without the spouse's written concurrence.[62] The election to participate must be made before retirement. Once made, the decision largely is irrevocable.

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[59] Direct payments are provided for in 10 U.S.C. § 1408(d) (1988).

[60] 10 U.S.C. § 1408(a)(2) (1988). ***See*** Carmody v. Secretary of the Navy, 886 F.2d 678 (4th Cir. 1989).

[61] The SBP is codified at 10 U.S.C. §§ 1447-1455 (1988).

[62] 10 U.S.C. § 1448(a)(3)(B) (1988).

An election to participate involves two choices: 1) the naming of beneficiaries and 2) a determination of the amount of the annuity. Eligible beneficiaries include the member's spouse, a former spouse, the member's dependent children, or in some cases an individual with an insurable interest in the member's life. The member determines how much the annuity will pay by choosing a level of participation. This is accomplished by designating a "base amount;" the minimum base amount is $349, and the member can select this level or any amount above $349, in $100 increments, up to the full amount of his or her retired pay.

The annuity's cost is governed by the beneficiary category and the level of participation. The monthly premiums are automatically deducted from military retired pay. A built-in cost break is present in comparison to commercial annuities, because the premiums are deducted before taxes are calculated. Thus, SBP premiums are paid with before-tax dollars.

The annuity for a spouse or former spouse is fifty-five percent of the selected base amount. This payment decreases when the beneficiary reaches age sixty-two, and the amount of the reduction for those who were retired or retirement eligible before October 2, 1985, is governed by a complex set of rules. For those who retire after this date, the annuity to a spouse is reduced to thirty-five percent of the base amount when the beneficiary reaches age sixty-two. A new supplemental SBP will allow retirees to pay an additional amount to provide an annuity at fifty-five percent with no reduction.

The annuity payable to a spouse stops altogether if the beneficiary remarries before age fifty-five. Payments are revived, however, if the marriage terminates for any reason.

B. THE SBP IN DIVORCE SITUATIONS

Originally, the Act provided that courts could not order a member to designate a former spouse as an SBP beneficiary. The member, however, could elect to do so voluntarily. The law changed in 1986, and now courts can issue these orders if state law affords the authority.

Regardless of any court order, a member is allowed only one **SBP** plan. **A** second spouse cannot be named as the SBP beneficiary if a former spouse holds that designation. If designation of the former spouse was purely voluntary, the second spouse may be substituted

in lieu of the former spouse. In these cases, however, military finance centers usually try to notify the former spouse that they have received a request for substitution. If the former spouse's beneficiary designation was based on a court order, then the request to substitute a second spouse will not be honored without a court order that allows the change.

Suppose the member retired before the date of the divorce. If he or she failed to elect SBP protection at the time of retirement, the divorce provides no grounds for reopening the issue.[63] In such a case, the former spouse cannot be designated as an SBP beneficiary, regardless of any court order to the contrary.

On the other hand, suppose the member designated the spouse as a beneficiary upon retirement and subsequently obtained a divorce. The divorce essentially terminates the spousal SBP election,[64] and the member must redesignate the former spouse as a beneficiary in order to retain coverage.[65] This redesignation must be accomplished within one year of the divorce.[66]

When the member is on active duty at the time of divorce and a court has ordered that a former spouse be designated as the SBP beneficiary, the law creates a straightforward method for ensuring the proper election is entered. The former spouse simply sends a copy of the court order to the respective military finance center and requests that a "deemed election"[67] be made when the member retires. Even if the member subsequently fails to designate the former spouse as the beneficiary upon retirement, the finance center automatically will implement SBP and establish the former spouse as the beneficiary.

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[63]This rule applies to those who have retired from active duty. *Id.* § 1448(a)(4)(A). Members of the Reserve component, however, have two SBP enrollment periods. The first opportunity arises when the member completes 20 years of service that is creditable for retirement purposes. Even if he or she chooses not to enroll at this time, however, a second opportunity arises when the retiree reaches age 60 and begins drawing military retired pay. *Id.* § 1448(a)(2).

[64]*See id.* § 1452(A)(3) (SBP premium deductions from retired pay stop when a retiree has no eligible spouse or former spouse beneficiary).

[65]*See id.* § 1448(b)(3) (providing that a member *may* elect to provide an annuity for the former spouse).

[66]*Id.*

[67]"Deemed elections" are provided for in 10 U.S.C. § 1450(f)(3)(A) (1988). Note that the spouse must request the "deemed election" within one year of the issuance of the order mandating SBP coverage. *Id.* Thus, spouses who obtain such an order should send it to the finance center *immediately,* regardless of the member's retirement plans.

C. KEY SBP ISSUES

A former spouse's desire to ensure the member elects SBP protection is quite understandable, but in some cases it is misguided. The principle problem is that the former spouse (or any other beneficiary) will receive no payments if he or she remarries before age fifty-five and remains remarried.

Thus, a spouse who has reasonable prospects for remarriage may be better served by insisting on a life insurance program covering the member's life rather than by SBP participation. The facts of each case must be examined carefully, but SBP is not *always* desirable. Of course, even when it may not represent the best protection available, insistence on SBP can be an effective negotiating tool.

When SBP protection is of value to the former spouse, he or she must be careful to negotiate an appropriate level of coverage. In this regard, remember that the annuity will be only fifty-five percent of the base amount. Confusion has reigned here because some have assumed they will receive the full base amount if the retiree dies.

Finally, former spouses should ensure that court orders and beneficiary designations are filed with the finance center within the prescribed time frame. If the parties were married at the time of retirement and SBP election, section 1448(b)(3)(A)[68] requires that the member file a new beneficiary designation in favor of the former spouse within one year of the date of the divorce decree. The former spouse does not have to rely on the member to make the designation; he or she should file a "deemed election" request immediately upon issuance of the divorce decree. Suppose, however, that the member misses the one-year deadline. The deemed election provisions may provide an alternative method of obtaining SBP coverage.

Under section 1450(f)(3),[69] the basic requirement for a deemed election is a court-approved[70] agreement between the parties providing that the member or retiree will designate the former spouse as the SBP beneficiary. Alternatively, the automatic election will be made if a court simply orders the member or retiree to make the designa-

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[68] *Id.* § 1448(b)(3)(A).
[69] *Id.* § 1450(f)(3).
[70] "Court-approved" is a broad term. It includes an agreement that has been incorporated, adopted, ratified, or approved in a court order. It also includes an agreement that simply has been filed with a court pursuant to state law. *Id.* § 1450(f)(3)(A).

tion, whether or not an agreement exists between the parties. Such an order may be incident to the divorce decree, or it may be issued at a later date.

As noted previously, the procedure for initiating a deemed election is simple. The former spouse makes a request in writing, accompanied by a copy of the court order that approves the agreement or otherwise requires the member or retiree to make a beneficiary designation. This request must be made within one year of the date of the court order. Unlike the provisions of section 1448(b)(3)(A), however, this filing requirement focuses on the date of any relevant court order, not necessarily on the date of the divorce decree itself.

Thus, when the retiree fails to make a timely section 1448 designation, the former spouse should obtain a supplementary court order that addresses the SBP issue. This new order can be used as the prerequisite for deemed election request.

V. CONCLUSION

The Uniformed Services Former Spouses' Protection Act grants authority for courts to treat military retired pay as community or marital property. It does not, however, give states an unfettered ability to divide these pensions. Practitioners must carefully consider the significance of the evolving term "disposable retired pay" when handling divorce cases involving military retirement pay. Similarly, a thorough understanding of related issues, such as jurisdiction and the survivor benefit plan, will help avoid the pitfalls that are engendered by the complexity of military benefits.

Counsel who represent military spouses should be especially mindful of the differences between state law and the federal scheme created by the Act. A knowledge of the issues, when combined with skillful negotiation, often can ensure that the spouse receives all the rights and benefits created by state family law regimes.

RESOLVING CHILD SUPPORT ISSUES BEYOND THE SCOPE OF AR 608-99

by Major Mark J. Connor*

I. INTRODUCTION

According to a Ford Foundation study cited in recent congressional hearings, forty-two percent of white babies born in America will live with a single parent by the time they reach eight years old and experience a major spell of poverty during that time! Eighty-six percent of black babies born in America will live with a single parent before they reach eight years old; these children will live in poverty most of that time.[2] Meanwhile, only ten percent of the custodial parents receiving welfare assistance also receive financial support from the noncustodial parent.[3] The problem of inadequate support of children by their noncustodial parents therefore has become a matter of national concern.

In a typical military legal assistance practice, child support issues have their genesis in a variety of circumstances. Often, they must be addressed during the drafting of separation agreements. They arise after a soldier admits or is proven to be the father of an illegitimate child. Finally, they arise when a custodial parent seeks to establish or enforce a child support order against the noncustodial parent. In these situations, legal assistance attorneys can expect to represent soldiers, retirees, or civilian custodial parents.[4]

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[1] *Implementing the Family Support Act of 1988: Hearings Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance*, 101st Cong., 1st Sess. 8 (1989).

[2] *Id.*

[3] *Id.* at 13.

[4] A civilian custodial parent who is the ex-spouse of a soldier or retiree usually is not entitled to legal assistance in his or her own right. The custodial parent can, however, seek legal assistance on behalf of the minor child of the soldier or retiree. *See* Army Reg. 27-3, Legal Services: Legal Assistance, para. 2-4 (10 March 1989).

Army attorneys confronted with a child support issue involving a soldier first should consult Army Regulation (AR) 608-99, Family Support, Child Custody, and Paternity.[5] AR 608-99 requires that soldiers provide "family members"[6] with "adequate and continuous support."[7] In the absence of a court order or a written support agreement, AR 608-99 mandates "minimum support requirements" for support of a soldier's family members, including legitimate children.[8] Failure to satisfy these obligations constitutes a violation of a lawful general regulation and requires commanders to take appropriate adverse administrative, nonjudicial, or judicial action against the soldier.[9]

Many child support issues, however, cannot be resolved through application of AR 608-99. Outside the military's confines, a client's concerns regarding child support obligations are addressed competently only by attorneys with at least a basic understanding of: 1) the "IV-A and IV-D programs;"[10] 2) state child support guidelines; 3) the Uniform Reciprocal Enforcement of Support Act and Revised Uniform Reciprocal Enforcement of Support Act; and 4) available child support enforcement mechanisms.

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[5] Army Reg. 608-99, Family Support, Child Custody and Paternity (22 May 1987) [hereinafter AR 608-99].

[6] A "family member" is defined to include a soldier's (1) present spouse; (2) former spouse (if court ordered); (3) natural and adopted minor children; (4) illegitimate children of woman soldiers and illegitimate children of male soldiers if support is ordered by a court; and (5) any other person the soldier has an obligation to support under the laws of the soldier's or supported person's domicile. *See* AR 608-99, Glossary, Section II.

[7] *Id.* para. 1-5a(1).

[8] *Id.* para. 2-4. These support requirements are summarized as follows:

1. Single family unit living on post (civilian spouse): the difference between BAQ at the with-dependents and the without-dependents rate for the soldier's pay grade.
2. Single family unit living off-post (civilian spouse): the full amount of BAQ at the with-dependents rate for the soldier's pay grade.
3. Multiple family units (not including a spouse in the Armed Forces): each family member is entitled to a prorata share of the with-dependent BAQ rate for the soldier's pay grade.
4. Both spouses in the Armed Forces.
   a. No children of the marriage—no support obligation, regardless of any disparities in pay grade.
   b. All the children of the marriage in the custody of one spouse—the difference between BAQ "with" and BAQ "without" for the noncustodial parent's pay grade.
   c. Custody of children of the marriage split between the two parents—neither parent owes a support obligation to the other.
5. Commanders can require soldiers to pay more than these guidelines in exceptional cases. A commander cannot, however, excuse payment of lesser amounts.

[9] *Id.* para. 1-4e(8).

[10] 42 U.S.C. §§ 651-669 (1988).

This article focuses on these four subject areas. It should provide legal assistance attorneys with a basic understanding of how the statutes, regulations, and guidelines in these areas can be used to help clients collect and provide support on behalf of a minor child. Conversely, it also should provide legal assistance attorneys with insight into how noncustodial clients are affected by federal and state laws and regulations.

II. UNDERSTANDING THE IV-A AND IV-D PROGRAMS

A. *THE IV-A PROGRAM*

Resolution of child support issues historically has been a state—not federal—concern."[11] Congress did not introduce the federal government into the child support arena until 1935, when it passed Title IV-A of the Social Security Act,[12] which created the Aid to Families with Dependant Children (AFDC) program. AFDC originally was intended to provide support to families with children when the primary wage earner was dead. Over time, however, the program has been used most frequently when the father deserted the family or was otherwise living separate from the family and not providing support. By the mid-1980's, nearly nine out of ten children receiving AFDC assistance had a living parent who was absent from the home.[13]

Under the AFDC program, each state determines its own eligibility criteria, subject to certain federally imposed requirements.[14] Each state also establishes its own monthly grant scale. These grants are typically at a minimal subsistence level.[15] Generosity is discouraged by a per capita cap on federal contributions to the state's program.[16]

In return for receiving AFDC assistance, grant recipients are re-

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[11]In 1859, the Supreme Court held that federal courts have no power to determine spousal support. Barber v. Barber, 62 U.S. 582 (1859). By inference, this holding was extended to other family support requirements.

[12]42 U.S.C. §§ 601-615 (1988).

[13]U.S. Dep't of Health and Human Services Office of Child Support Enforcement, History and Fundamentals of Child Support Enforcement 1 (2d ed. 1986).

[14]*See* 45 C.F.R. § 233.20 (1989).

[15]In 1986, for example, California was awarding an AFDC eligible parent and child with no other income a grant of $498 per month. The federal poverty level for a two person household in 1986, however, was $603 per month. ***See*** M. Greenberg, Protecting Rights to Public Benefits for Parents and Children (1987).

[16]*See* 42 U.S.C. § 603 (1988).

quired to assign the state their rights to collect support from the noncustodial parent.[17] Grant recipients also must assign any arrearages that have accrued under an existing support order.[18] Thereafter, any support paid by the noncustodial parent must be paid directly to the state as long as the custodial parent remains enrolled in the AFDC program.[19]

The first fifty dollars collected by a state from a noncustodial parent is paid directly to the AFDC recipient together with the regular AFDC payment.[20] This "pass through" does not affect the custodial parents entitlement to further AFDC payments.[21] Amounts received from an obligor by the state in excess of fifty dollars are distributed according to the following priority scheme: 1)the state and federal government are reimbursed for their portion of AFDC paid that month;[22] 2) the family receives any remaining money up to the amount of the current court ordered monthly support obligation;[23] **3)** the state is reimbursed for any arrearages owed it for prior AFDC payment;[24] **4)** the custodial parent is entitled to the remainder to satisfy any arrearages owed by the support obligor.[25] When AFDC payments stop, the assignment of support also terminates except with respect to the amount of the accrued unpaid support obligation that has been paid out in AFDC.[26]

Children of soldiers can qualify for AFDC. Since 1982, however, AFDC assistance has not been available to children deprived of support whose parent's continued absence from home is "occasioned solely by reason of the performance of active duty in the uniformed services of the United States."[27] As a result, custodial parents still married to soldiers have the burden of proving that they would be separated from the soldier even if military service was not a factor prior to receiving AFDC benefits for their children.

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[17]*See* **45** C.F.R. § 232.11 (1990).

[18]*Id.* When arrearages are substantial, and a realistic chance of collecting them from the obligor exists, attorneys should consider counseling potential AFDC recipients *to* defer making an AFDC application until collection is made to avoid having to assign the arrearages to the state.

[19]45 C.F.R. § 302.32 (1989).

[20]*Id.* § 302.51(b)(1).

[21]*Id.*

[22]*Id.* § 302.51(b)(2).

[23]*Id.* § 302.51(b)(3).

[24]*Id.* § 302.51(b)(4).

[25]*Id.* § 302.51(b)(5).

[26]42 U.S.C. § 602(a)(26)(A); ***see*** *also* 45 C.F.R. §§ 302.51(b)(4) and 302.51(f).

[27]42 U.S.C. § 606(a) (1988).

B. THE IV-D PROGRAM

By fiscal year 1973, the federal government was spending $7.6 billion yearly on AFDC.[28] As congressional dissatisfaction with the cost of the IV-A program grew, so did calls for reform:

> Should our welfare system be made to support the children whose father cavalierly abandons them or chooses not to marry the mother in the first place? Is it fair to ask the American taxpayer who works hard to support his own family and to carry his own burden to carry the burden of the deserting father as well? Perhaps we cannot stop the father from abandoning his children, but we can certainly improve the system by obtaining child support from him and thereby place the burden of caring for his children on his own shoulders where it belongs. We can, and we must, take the financial reward out of desertion.[29]

Ultimately, this congressional sentiment turned into action, and legislation creating Title IV-D of the Social Security Act[30] was passed in 1975.

Like the IV-A program, the IV-D program is state administered within guidelines set by the federal government. Today, state run IV-D programs provide all registered custodial parents with a low cost means of collecting court or administrative-agency-ordered child support from the noncustodial parent. Receipt of AFDC is not a prerequisite, although non-AFDC custodial parents are required to pay a modest application fee.[31] By using the IV-D program, custodial parents are represented in state administrative or judicial hearings to establish or enforce support orders by a lawyer employed by the state. This representation is provided free of charge.

As amended, the IV-D program requires that states receiving federal AFDC funding enact a wide variety of tools to ensure that adequate levels of child support are ordered and paid. States are now required to have legislation authorizing: 1) income tax refund intercept programs to collect arrearages in IV-D case;[32] recording

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[28] Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, Child Support Reference Manual III-2 (1989).

[29] 118 Cong. Rec. 8291 (1975) (statement of Senator Long).

[30] Pub. L. No. 93-647, 88 Stat. 2351 (codified at 42 U.S.C. §§ 651-657 (1988).

[31] *See* 45 C.F.R. § 302.33(2) (1988) (currently, the application fee for non-AFDC custodial parents usually does not exceed $25).

[32] 42 U.S.C. § 666(a)(3) (1988).

of personal and real property liens to enforce child support obligation ~3) the reporting of child support arrearages exceeding $1000 to credit bureaus upon request of any consumer reporting agency;[34] 4) absent special circumstances,[35] immediate wage withholding in all IV-D cases in which a child support order is issued or modified after November 1, 1990, and in all cases in which a new child support order is issued on or after January 1, 1994;[36] (5) promulgation, and revision, at least every four years, of child support guidelines with the force of rebuttable presumptions;[37] 6) periodic review and adjustment of IV-D child support orders pursuant to the state's support guidelines;[38] and 7) genetic testing provided upon the request of either party to a contested paternity action.[39]

One amendment to the IV-D program deserves special mention. The "Bradley Amendment" to the Omnibus Reconciliation Act of 1986 required states to enact laws making each installment of child support obligations ordered by a court or state administrative agency a judgment, by operation of law, when due.[40] As a result, court and administrative agency ordered support obligations are entitled to full faith and credit and generally[41] cannot be modified retroactively. This

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[33] *Id.* § 666(a)(4).

[34] *Id.* § 666(7).

[35] To avoid immediate withholding, one party must demonstrate, and the court or administrative agency concerned must find, that: "(1) There is good cause not to require immediate income withholding; or (2) A written agreement is reached between the parties that provides an alternate arrangement." ***Id.*** § 666(b)(3)(A).

[36] *Id.* § 666(b)(3). Withholding for IV-D cases in which a support order was issued prior to November 1, 1990, can be ordered whenever one month's support arrears has accrued; the obligor requests withholding; the custodial parent requests withholding and the state determines such a request should be approved; or at such other date as a state may elect. *Id.*

[37] *Id.* §§ 667(a), 667(b).

[38] *Id.* §§ 666(a)(10)(A), 667(a)(10)(B). This requirement is being implemented in stages. By October 13, 1990, each state must have a plan and procedures for periodic review of IV-D cases and must undertake a review at the request of a party to the order or a IV-D agency if it is an AFDC case. Not later than October 13, 1993. states must have an automatic. review process implemented for the IV-D orders. Reviews will be mandatory unless: in AFDC cases. the state has determined pursuant to federal guidelines such a review would not be in the child's best interest and neither parent has requested the review; or in non-AFDC cases in which neither parent has requested a review.

[39] *Id.* § 666(a)(5).

[40] *Id.* § 666(a)(9).

[41] This situation still arises when parents decide to a change in physical custody without seeking court ratification of their decision and modification of the support order. Without a modification of the support order, installments of support obligations continue to accrue as judgments when due and later can be enforced against the obligor by the obligee. To avoid unjustly enriching a noncustodial support order obligee, some courts have chosen to disregard the rule against retroactive modification of judgments. ***See,*** *e.g.*, Karypis v. Karypis, 458 N.W.2d 129 (Minn. Ct. App. 1990). Other courts, however, have applied the rule strictly despite the harsh result. ***See,*** *e.g.*, Goold v. Goold, 11 Conn. App. 268, 527 A.2d 696 (1987); Waple v. Waple, 179 Mich. App. 678. **446** N.W.2d 536 (1989).

simplifies the process of collecting child support by allowing custodial parents to avoid litigating the amount of support arrearages owed.

The Bradley Amendment greatly assists custodial parents' efforts to collect child support from noncustodial parents residing in other states.[42] It also places a premium on the noncustodial parent's ensuring that changes in circumstances affecting the ability[43] or obligation[44] to pay child support are brought promptly to the appropriate court's attention. Otherwise, the noncustodial parent will have outstanding judgments against him or her that can be satisfied only by payment in full.[45]

As the potential of the IV-D program is realized, legal assistance clients are increasingly likely to be involved. In particular, legal assistance attorneys should be careful in discussing the probable impacts of requesting the review of an existing IV-D support order with a client. Such a review can result in either upward or downward revision of the amount awarded. An ill-advised request for review, therefore, can have unintended adverse consequences.

The legal assistance attorney's role is critical because the legal assistance client probably will not have an attorney-client relationship with the IV-D attorney assigned to the case. Most[46] jurisdictions have taken the position adopted by Tennessee:

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[42] Prior to this amendment, custodial parents could have their support orders registered, pursuant to RURESA §§ 36-40, or registered and confirmed, under URESA §§ 34-36, as appropriate. Use of these procedures gave foreign state child support orders the same effect as though they originally had been entered in the state where registered (and confirmed in URESA jurisdictions). Arrearages under this system, however, did not automatically convert into judgments. As a result, obligors frequently raised a variety of defenses to sympathetic state courts. *See infra* notes 96-108 and accompanying text.

[43] Anything that substantially diminishes a child support obligor's income for more than a brief period of time should be reported to a court immediately in support of a motion to modify the support obligation. Qualifying changes in circumstances include any situation in which a soldier has been reduced in rank. It also would include the situation in which a reservist's income has been reduced substantially as the result of being called to extended active duty.

[44] *See supra* note 41.

[45] Noncustodial parents should know that child support obligations are among those categories of debts that cannot be discharged in bankruptcy. All types of child support that are enforced by a court order are nondischargeable, including paternity orders of support, orders obtained under URESA and RURESA, and orders for reimbursement of AFDC funds provided the debtor's children. *See* 42 U.S.C. § 523(a)(5)(A) (1988).

[46] Alabama, Florida, North Dakota, and Ohio recognize the custodial parent as the client in non-AFDC IV-D cases. In West Virginia and Louisiana, the child is the client and the custodial parent is regarded as the guardian *ad litem*. Sablan, *Legal Ethics: Attorney Client Dilemma Within the Child Support Program*, 8 Juv. and Child Welfare L. Rep. 94 (1990).

> [T]here is no conflicting, diverse, or differing interests in [a IV-D attorney] seeking downward modifications of child support; and, in addition there may be an affirmative obligation to do so in order to seek justice. Also, there is no impropriety in the same attorney seeking support or modification of support for one parent after a change of custody and having previously participated in establishing support for the other parent.[47]

As a result, if legal assistance attorneys are unwilling or unable to advise their clients on the merits of seeking a modification, clients will be forced to seek advice from a potential advocate for the other parent.

III. CHILD SUPPORT GUIDELINES

Traditionally, child support awards were the products of a judicial system virtually unrestrained by objective standards. The amount of support awarded in similar cases in the same jurisdiction often varied widely.[48] Moreover, the support awarded frequently was set at levels far below the amount necessary to meet the children's actual needs.[49]

As noted previously, Congress acted during the 1980's to require states to develop child support guidelines.[50] State courts and agencies now are required to treat these guidelines as rebuttable presumptions of adequate levels of support.[51] Moreover, the reasons supporting deviations from the guidelines must be made a matter of record.[52]

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[47]Supreme Court of Tennessee Board of Professional Responsibility, Formal Ethics Op. 90-F-55 (1990). Disclosures to the contrary notwithstanding, most support obligees (and now support obligors seeking a downward revision) regard IV-D attorneys as "their attorney." This perception is encouraged by judges who invariably refer to IV-D program clientele as the IV-D attorney's "client." The problem is particularly acute in non-AFDC IV-D cases in which no apparent state interest exists to represent. In those cases, it typically appears to all concerned that the IV-D attorney is involved in the adjudication as an advocate for one of the parties' individual interests.

[48]*See* Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Den. L.J. 21 (1979).

[49]*Id.* at 36 (noting that two-thirds of the fathers studied were ordered to pay less monthly child support than they were spending on monthly car payments).

[50]*See supra* note 37.

[51]42 U.S.C. § 667(b) (1988).

[52]*Id.*

Because Congress allowed each state to develop its own guidelines, details of state guidelines vary widely.[53] All state schemes, however, are derived from one of three[54] basic theoretical models. Understanding the basic principles of these models can assist the legal assistance attorney in advising clients on whether deviation from guidelines isjustified or where, within a given range of support, a client or target obligor is likely to fall.

A. INCOME SHARING

Guidelines based on the income sharing model are designed to allocate a certain percentage of a parent's income to the raising of a child or children. Percentages typically vary based on factors such as the number of children, ages of the children, and the parents' respective incomes.

The simplest version of income sharing is exemplified by Wisconsin's Percentage of Income Standard.[55] That model sets child support at a fixed percentage of the noncustodial parent's gross income. Under the Wisconsin system, noncustodial parents are required to pay seventeen percent of their gross income for support of one child, twenty-five percent for two children, twenty-nine percent for three children, thirty-one percent for four children, and thirty-four percent for five or more children.[56]

Variations on the Wisconsin approach include applying the percentage to net income[57] and also using varying percentages for each child depending on the income of the noncustodial parent.[58] Another variation of income sharing is embodied in the "income-shares"[59]

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[53]Federal regulations require state guidelines to be quantitative in nature, providing "specific descriptive and numeric criteria and result[ing] in a computation of the support obligation." 45 C.F.R. § 302.56(c) (1989).

[54]A fourth approach academics refer to is the cost-sharing model. This model seeks to determine the costs of raising a child and then allocate the costs proportionate to the parent's respective incomes. This approach, however, does not account for the fact that it costs more to raise a child in an affluent lifestyle then it does at a lifestyle barely above the poverty level. As a result, pure-cost sharing is not the basis of any state's guidelines.

[55]Wis. Admin. Code §§ HSS 80.01-80.05(1990).

[56]*Id.* at app. A.

[57]*See, e.g.*, N.H. Rev. Stat. Ann. § 458-C:3 (1988).

[58]*See, e.g.*, 1988 Minn. Laws § 518.551(5).

[59]"Income-shares" was developed by the Child Support Guidelines project staff of the National Center for State Courts. The term "shares" connotes a child's rightful claim *to* a portion of parental income similar to that enjoyed by a corporate shareholder in the profits of a corporation. *See* U.S. Dep't of Health and Human Services, Office of Child Support Enforcement, *Development of Guidelines for Child Support orders: Advisory Panel Recommendations and Final Report*, 11-67 (1987) [hereinafter *Development of Guidelines*].

approach. Income-shares purports to provide children the same percentage of combined parental income that would have been spent on "current consumption expenditures"[60] for children had the parents lived together. After total consumption expenditures are calculated, parental support obligations are assigned to the parents in proportion to the ratio of their individual incomes to their combined total incomes.[61]

Refinements of this model include providing different levels of consumptive expenditures for children in different age brackets. These adjustments recognize the various levels of need children experience at different ages.[62]

B. EQUAL LIVING STANDARD

The Equal Living Standard approach is designed to ensure comparable standards of living in both the custodial and noncustodial household. Under this approach, the parents' income is combined and then reapportioned according to the size and composition of each household. A standard comparative scale[63] is used as a frame of reference to compare the needs of the two households. The scale used is not important, as long as it accurately reflects that it costs more for custodial parents to maintain a certain standard of living for themselves and their children then it does for a noncustodial parent living alone.

This approach provides a relatively simple and apparently equitable means of determining child support, although it is not the primary method of determining child support in any state. Many guideline drafters apparently feel that income equalization constitutes "hidden alimony to the extent it raise[s] the custodian's living standard as well as the children's."[64]

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[60] "Current consumption expenditures" typically excludes items such as gifts, charitable contributions, insurance. pensions, taxes, repayment of principal on a home mortgage, and savings. It also ignores nonmonetary costs of child-rearing like services and lost-earning opportunity costs. *See* Goldfarb. *What Every Lawyer Should Know About Child Support Guidelines,* 13 Fam. L. Rep. **(RNA)** 3031, 3034 (1987) [hereinafter *What Every Lawyer Should Know*].

[61] The following example illustrates how the model works. Parent X's income is $2000 per month. The custodial parent, Parent Y, has an income of $500 per month. Current consumption expenditures for their child are determined to be $400 per month. Parent X would be required to pay 4/5 (2000/2500) of $400, or $320.

[62] *Development of Guidelines, supra* note 59, at II-76.

[63] *E.g.*, the Bureau of Labor Statistics Revised Equivalence Scale.

[64] Dodson, *A Guide to tkr Guidelines,* 10 Fam. Adv. **4,** 6 (1988).

Vermont primarily uses the "income-shares" approach. It does allow state courts, however, to order supplemental payments by the noncustodial parent to the custodial parent "if the court finds that the [parties'] disparity [of income] has resulted or will result in a lower standard of living for the child than the child would have if living with the non-custodial parent."[65]

C. HYBRID APPROACH— THE MELSON FORMULA

Some states have adopted a hybrid approach that combines principles of cost sharing[66] and income-sharing. The most popular version of this approach is known as the Melson Formula.[67] Application of the Melson Formula involves a four-step process.

First, the parents' net income is determined. From this figure, the minimum amount necessary for a parent to meet personal subsistence requirements is subtracted.[68] Income remaining is deemed available for payment of child support.

Second, the child's primary support needs have to be determined. Support needs are defined as the minimum amount necessary to maintain a child at a subsistence level. They also include the custodial parent's work-related child care costs and any child-related extraordinary medical expenses.

Third, the primary support needs of the child are prorated between the parents based on the ratio of their respective net incomes as determined by the first step.

Finally, a standard of living allowance (SOLA) is calculated. The SOLA consists of a percentage of the noncustodial parent's income remaining after meeting their allocated portion of the child's primary support needs. The SOLA amount paid to the custodial parent allows

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[65] Vt. Stat. Ann. tit. 15 § 656(d) (1990).

[66] *See* ***supra*** note **54.**

[67] Initially created by Judge Elwood F. Melson, Jr., the Melson approach has been used in Delaware since 1979. It since has been adopted as the primary or alternate means of determining child support in a number **of** jurisdictions, including Hawaii, Maryland, and Wisconsin. ***See*** *Development of Guidelines*, ***supra*** note 59, at II-80.

[68] *Id.* at 81. Parents who are living with another working adult have their support allowance adjusted downwards to reflect the economies of scale realized through nonduplication **of** living expenses.

a child to benefit from the higher living standard usually enjoyed by a noncustodial parent.[69]

D. WORKING WITH GUIDELINES

While support guidelines are helping to promote consistency in child support awards, legal assistance attorneys must not conclude that child support is a problem solved simply through application of mathematical formulas.

As an initial matter, legal assistance attorneys should counsel a custodial parent client to ensure that all of the noncustodial parent's income is recognized. In general, all of a soldier's and retiree's pay and allowances should be considered as income for purposes of setting the support obligation.[70] Many soldiers live in government accommodations and eat in the mess hall for free. This "in kind" income is usually not obvious to civilian practitioners and courts, and it may justify an upward adjustment in support owed. Moreover, Basic Allowance for Quarters (BAQ), Basic Allowance for Subsistence (BAS)/ Separate Rations, Variable Housing Allowance (VHA), and military and veterans' disability payments can constitute large portions of a soldier's or retiree's total income. These items, however, are not taxable. If state guidelines are based on gross pay, attorneys should argue that the soldier's income should be adjusted upward to account for the increased value of nontaxable income.

Legal assistance attorneys also should determine whether or not a parent can show "extraordinary expenses or circumstances" justifying variance from the guidelines. Under most guidelines, the percentage of parental income that is awarded as child support declines as parental income increases. This often exacerbates existing income disparities between the custodial and noncustodial households.[71] As a result, attorneys should explore means of demonstrating that an upward deviation from the state guidelines is appropriate.

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[69] "Currently, the financial penalties that accompany divorce, separation, and single parenthood are extremely unequally divided between noncustodial and custodial parents' households. A well known California Study showed that one year after divorce. men experienced a 42 percent improvement in their standard of living. while woman and children experienced a seventy-three percent decline in theirs." *What Every Lawyer Should Know*, *supra* note 60, at 3033 (citing L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 323 (1985)).

[70] *See* Rose v. Rose, 107 S. Ct. 2029 (1987); *c.f.*, Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1988); Peterson v. Peterson, 98 N.M. 744, 652 P.2d 1195 (1982).

[71] *See* L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985)(study showing that divorce frequently raises noncustodial parent's and lowers the custodial parent's standard of living).

Potentially fruitful arguments for upward modifications include increased child care and child educational expenses. Many states, for example, include child care as a component of support only to the extent the child care is necessary for the custodial parent to maintain employment. **As** one commentator noted:

> Counsel for the custodial parent should examine whether child care is needed on a continuing basis because of the parent's illness, education, training, or other obligations (such as caring for an elderly parent), or simply for the best interests of the child (e.g., to further the child's social and educational development through enrollment in group day care).[72]

Educational expenses attributable to children also should be examined closely. Counsel should determine whether the children involved have special gifts or handicaps justifying the need for education beyond that offered by public schools. Moreover, the children's potential for attendance at college should be considered. States **differ** in their willingness to require the noncustodial parent to pay a nonminor child's educational expenses.[73] Compelling arguments can be made that failure to make any provision for a child's attendance at college either prevents the child from attending or forces the custodial parent to shoulder the expense alone.

Noncustodial parents also may have compelling grounds to seek deviations from support guidelines. The most effective rationale for support modification remains the emancipation, death, marriage, or enlistment in the armed forces of the child to be supported. In addition, some states will consider whether or not the child is employed on a regular and sustained basis. While not as widely accepted by courts, the existence of another family to support is often a matter of extreme concern to the remarried noncustodial parent and can be used to justify a downward adjustment in the guidelines amount.

111. USE OF URESA AND RURESA TO OBTAIN AND ENFORCE INTERSTATE SUPPORT ORDERS

Probably no segment of American society is more mobile than those serving in or accompanying the military. **As** a result, military at-

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[72]Goldfarb, *Dealing With Extraordinary Expenses*, 10 F'am. **Advoc.** 38, 39 (1988).
[73]*See* Horan, *Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, **20** Fam. L. Q. 589 (1987).

torneys must be familiar with the Uniform Reciprocal Enforcement of Support Act[74] (URESA) and the Revised Uniform Reciprocal Enforcement of Support Act[75] (RURESA) (together, the Acts) because they provide a relatively simple and low cost means of overcoming the problems associated with obtaining and enforcing support, orders across state lines and national boundaries.

URESA originally was promulgated in 1950 and was amended in 1952 and 1958. RURESA was promulgated in 1968. RURESA is an improvement on URESA in that it allows reciprocity with non-United States jurisdictions,[76] contains specific provisions for paternity determinations,[77] and uses simplified methods for enforcing existing support orders from other states.[78] Currently, sixteen states, territories, and the District of Columbia continue to follow URESA.[79] The other thirty-seven states have adopted RURESA.[80]

The Acts are designed to facilitate the entry of support orders against "obligors"[81] in the state where they reside. They impose no substantive support requirements on an obligor. Instead, the Acts provide procedural methods for courts to follow to establish or enforce support obligations owed by obligors to "obligees."[82]

A. ESTABLISHING A SUPPORT OBLIGATION USING THE ACTS

Actions to establish support obligations brought under the Acts are

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[74] 9B U.L.A. §§ 1-43 (1958) (hereinafter URESA § ___).

[75] 9B U.L.A. §§ 1-43 (1968) (hereinafter RURESA § ___).

[76] This was accomplished by broadening the definition of the term "state" to include "any foreign jurisdiction in which this (RURESA) or any substantially similar reciprocal law is in effect." *See* RURESA § 2(m).

[77] RURESA § 27.

[78] RURESA §§ 39-40.

[79] Ala., Alaska. Conn.. Del.. D.C., Guam, Ind., Md., Mass., Miss., Mo., N.Y., P.R., Tenn., Utah., V.I., and Wash.

[80] Ariz., Ark., Cal., Colo., Fla., Ga., Haw., Idaho., Ill., Iowa., Kan., Ky., La., Me., Mich., Minn., Mont., Neb., Nev.. N.H., N.M., N.C.. N.D., Ohio., Okla., Or., Pa., R.I., S.C., S.D.. Tex., Vt., Va., W. Va., Wis., and Wyo.

[81] " 'Obligor' means any person owing a duty of support." URESA § 2(g); *see also* RURESA § 2(g) ("'Obligor' means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.").

[82] " 'Obligee' means any person to whom a duty of support is owed and a state or political subdivision thereof." URESA § 2(h); *see also* RURESA § 2(f)(" 'Obligee' means a person[,] including a state or subdivision[,] to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of support or registration of a support order. It is immaterial if a person to whom a duty of support is owed is a recipient of public assistance.")

commenced by a person with legal custody of a minor filing a petition with a state court seeking child support from a person residing in another state.[83] Following a review to ensure "the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that the responding court can obtain jurisdiction of the obligor or his property," the initiating court forwards the petition for filing to the appropriates4 court in the responding state.[85] Filing fees are not assessed against the obligee by either the initiating or responding court, but fees may be assessed against an obligor.[86]

After the case is reviewed by the responding court, the case is assigned to a local prosecutor[87] who then assumes representation of the obligee.[88] Ultimately, a hearing is held and the obligor normally is ordered to pay support in an amount consistent with the obligor's financial resources and the laws of any state in which the obligor was present during the period for which support is sought.[89] Obligors are presumed to be present in the responding state during the period for which support is sought "unless otherwise shown."[90]

Putative obligors may find that mounting an effective defense to actions brought under the Acts is difficult. As previously mentioned, the obligee's interests are represented by an attorney provided at no expense by the state. Obligors, however, generally are not provided counsel unless they are indigent and their case involves recovery of public support[91] or a determination of paternity.[92] In addition, most jurisdictions do not require that the obligee appear at the hearing if other means of confronting[93] the obligee are available to the obligor. This places a premium on understanding the means and methods of discovery—somethingbeyond the comprehension of many putative obligors.

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[83]RURESA § 13; URESA § 13.

[84]Under RURESA, venue is proper in any court with jurisdiction over the obligor or the obligor's property. **See** RURESA § 11(b). URESA does not address the issue of venue.

[85]RURESA § 14; URESA § 14.

[86]RURESA § 15; URESA § 15.

[87]Neither RURESA or URESA prohibit obligees from hiring a private attorney to represent them against defendant-obligor. Attempts by an obligee to collect the costs of such representation from an obligor may, however, fail. **See** Olson v. Olson, 534 S.W.2d 526 (Mo. Ct. App. 1976)(attorney's fees not awardable where a prosecuting attorney was available at no charge pursuant to state statute).

[88]RURESA § 18; URESA § 18.

[89]RURESA § 7; URESA § 7. Note that this means the support guidelines where the obligor resides constitute a rebuttable presumption of the extent of the obligor's support obligation. **See** *supra* note 51.

[90]RURESA § 7; URESA § 7.

[91]*See, e.g.*, County of Ventura v. Tillett, 133Cal. App. 3d 105, 183Cal. Rptr. 741 (1982).

[92]*See, e.g.*, Salas v. Cortez, 80 Cal. App. 3d 427, 145Cal. Rptr. 727, 593P.2d 226 (1979).

[93]Through use of depositions, interrogatories, etc.

Finally, putative obligors cannot use a URESA or RURESA action to obtain jurisdiction over an obligee for any other proceeding.[94] As a result, they lack the potential leverage realized from filing a counterclaim against obligees.

B. ENFORCING EXISTING SUPPORT ORDERS

Enforcing an existing support order in another state formerly was an extremely arduous task. To receive full faith and credit in a sister state, the support order would have to be reduced to a judgment in the state where it originally was issued.[95] Because a hearing was involved, the obligor would have to be served with process pursuant to the forum state's long-arm statute. Assuming service was possible, the obligor then was entitled to present defenses. These defenses ranged from claims of changed financial circumstances to allegations that support was not owed because of the obligee'sinterference with the obligor's right to visitation. In essence, the support proceeding was relitigated.

This situation has changed for the better. The Bradley Amendment of 1986 mandated that states enact statutes that transform, by operation of law, support obligations into judgments as each installment of support comes due.[96] As a result, retroactive modifications of support orders are largely becoming[97] matters of historical interest.

Moreover, the Acts provide for a process called "registration.'' Registration essentially transforms an existing support order into an order issued by the state in which the obligor resides. Enforcement of the order can then be undertaken pursuant to the law of the obligor's state of residence.

Under the Acts, the registration process is initiated by obligees. They must file three certified copies of the support order, including any modifications, and one copy of the reciprocal enforcement of support act of the state in which the order originally was entered with a clerk of court in the state where the obligor is residing.[98] In addition, they must submit a verified statement listing: 1)their post

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[94]RURESA § 32; URESA § 31.
[95]U.S. Const. art. IV, § 1;*see also* 28 U.S.C. § 1738 (1988).
[96]*See supra* note 40.
[97]*But see supra* note 41.
[98]RURESA § 39; URESA § 36 (under URESA there is no requirement that the petitioner include a copy of the reciprocal enforcement of support statute for the state where the order originally was entered).

office address; 2) the obligor'slast known place of residence and post office address;[99] 3) the amount of support remaining unpaid under the order; 4) the description and location of property of the obligor available for execution; and 5) a list of all other states where the order has been registered.[100] The clerk of the court then registers the support order with the state'sregistry of foreign support orders, dockets the case, notifies the prosecutor, and sends a copy of the registered support order to the obligor by registered or certified mail.[101]

The obligor has twenty days to contest a registered order before the order is "confirmed."[102] Once the order is confirmed, the obligor can raise only defenses available in an action to enforce a foreign state money judgment.[103]

While registration of a foreign state support order often is advantageous, attorneys should consider *all* the possible effects of advising a client to use registration. Because orders registered pursuant to the Acts are considered "native" to the registering state, they potentially are subject to modification pursuant to that state's laws and support guidelines. That could result in a downward modification of the amount of support owed prospectively by the obligor.[104] This adverse effect is tempered somewhat, however, by the general rule[105] that an order entered under the Acts does not nullify, modify, or supersede a preexisting order unless the entering court specifically so provides.[106] In those cases, differences in amounts between original and subsequent orders entered under the Acts constitute arrearages

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[99]The Federal Parent Locator Service can assist a custodial parent determine this information. The service provides access to tax, police, driving, unemployment insurance, postal, and military records that are maintained by the federal and state governments as a means of locating noncustodial parents. Only state authorities can access the service directly, however, and a fee is charged for its use. 42 U.S.C. § 653 (1988).

[100]RURESA § 39; URESA § 36 (under URESA the petitioner need only list the amount of support unpaid under the order and any other states the order has been registered in).

[101]RURESA $40; URESA § 37 (the duties of the clerk are not specified in URESA; service on the defendant is to be conducted pursuant to state law).

[102]RURESA § 40; URESA § 37 (no time limit is set for a defendant's contesting a registered order. Instead, confirmation occurs if the obligor defaults or appears to contest the order and, nonetheless, is judged to owe support).

[103]A court's lack of subject matter or in personam jurisdiction, fraud, and the statute of limitations can be raised successfully to defend against foreign money judgments.

[104]This would most likely occur when the original support order was entered in a state whose support guidelines were more generous then those employed in the registering state.

[105]RURESA now specifically so provides. See RURESA § 31.

[106]*See, e.g.*, Georgia v. Mckenna, 253, Ga. 6, 315 S.E.2d 885 (1984); Minnesota *ex rel.* McDonnell v. McCutcheon, 337 N.W.2d 645 (Minn. 1983).

that continue to accrue and that can be collected in subsequent proceedings. At least one court, however, has ruled that a court operating pursuant to the Acts "globally" modifies the amount of support owed for any future proceedings, effectively eliminating the accrual of arrearages resulting from orders for differing levels of support.[107]

RURESA provides another means of enforcing a foreign state support order in the state in which the obligor resides. Under RURESA, a certified copy of a foreign support order can be submitted to a court, where it must be considered as evidence of the duty of support.[108] Obligors can raise the same defenses available against registered foreign support orders. In addition, however, obligors can raise nonpaternity as a defense, as long as the claim does not appear frivolous to the court.[109]

C. THE LEGAL ASSISTANCE ATTORNEY'S ROLE

Legal assistance attorneys with clients named as defendants in actions pursued under the Acts can play a critical role in protecting the client's interests. At a minimum, they can assist in answering discovery served on the client. They also can help the client serve the plaintiff with discovery designed to produce responses bolstering the client's case. Finally, they can advise the client on the merits of obtaining civilian counsel and can make referrals as appropriate.

Legal assistance attorneys with clients who are plaintiffs in support actions brought under the Acts also have a role to play. States attorneys representing plaintiffs in actions brought under the Acts notoriously are overworked, and often are inexperienced. In many jurisdictions, the attorney who represents the plaintiff is primarily a criminal prosecutor with limited civil discovery experience. The combination of huge caseloads and inexperience can result in the slow prosecution of a client's case.[110] Worse yet, it can result in a client's case being dismissed or in the amount of support awarded

[107]Harris v. Harris, 512 So. 2d 968 (Fla. Dist. Ct. App. 1987) (trial court did not err in assessing arrears based on a reduced amount of child support ordered by a Connecticut court that entered the order pursuant to URESA).

[108]RURESA § 23.

[109]RURESA §§ 23, 27.

[110]According to a recent study. the average time to establish an interstate support order was eight months. By way of comparison, states report that, on average, it takes three months to establish a support order within a state. U.S. General Accounting Office, Interstate Child Support: Case Data Limitations, Enforcement Problems, Views on Improvements Needed 15 (1989).

being reduced substantially."' Legal assistance attorneys should monitor the progress of a client's case to ensure that discovery is filed and answered as appropriate, and that court dates are set and kept.

IV. MECHANISMS OF COLLECTING CHILD SUPPORT

Once a child support obligation is established, it must be paid to be of any benefit to the minor child. In 1984, the nationwide gap between what was paid and what was owed was estimated to be $3.7 billion.[112] The magnitude of the shortfall has resulted in a variety of aggressive methods being used to collect child support, including automatic wage withholding, use of liens, tax refund intercepts, and reporting of arrearages to credit bureaus. Soldiers are not exempt from these enforcement efforts. Moreover, two techniques—the mandatory (or involuntary) allotment and the withholding provisions of the Uniformed Services Former Spouses' Protection Act[113]—apply only to soldiers and military retirees. The requirements and limitations of these basic enforcement techniques are discussed below.

A. GARNISHMENT

Garnishment can be used to recover support arrearages, to enforce a current obligation, or both, as allowed by state law and ordered by a court. The Social Security Amendments of 1974 included a limited waiver of the federal government's sovereign immunity against state garnishment actions. As a result, current and retired federal employees' pay can be garnished for alimony and child support obligations.[114] The use of garnishment against nonfederal employees and retirees is governed entirely by state law.

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[111] *See, e.g.*, Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981). In *Thelen* the public prosecutor made a "pro forma" appearance on behalf of a URESA plaintiff. The defendant-obligor was represented by private counsel. Largely as the result of the public prosecutor's gross ineffectiveness, the trial court denied the plaintiff's claim for $3900 in arrearages and reduced the obligor's support obligation from $800 per month to $400 per month.

[112] Williams, Modifications of Child Support Orders: Discussion Paper 2 (1989) (unpublished paper presented to the Third National Child Support Conference) (*citing* Williams, Inadequate Child Support: Economic Consequences for Custodial Parents and Children (1988)).

[113] Codified at various sections throughout title 10 of the United States Code. The provision dealing with child support is codified at 10 U.S.C. § 1408(a)(2)(B)(i) (1988); *see also* 32 C.F.R. part 63.

[114] *See* 42 U.S.C. §§ 659-662 (1988).

"Moneys due from, or payable by, the United States" can be garnished from a current or retired federal employee's pay for child support.[115] Military active duty, reserve, and retired pay fall within the definition of "moneys due."[116] Generally,[117] veteran benefits for service-connected disabilities are exempt from garnishment.[118] They can be considered as income by state courts, however, for purposes of determining the correct amount of a child support obligation.[119]

Amounts of federal pay subject to garnishment are reduced by certain withholdings, the most significant being income tax withholdings.[120] In addition, BAQ, BAS, and VHA are exempt from garnishment.[121]

The percentage of pay subject to garnishment is capped. Generally, state law limits the percentage of "net" pay that can be garnished. A federal ceiling contained in the Consumer Credit Protection Act (CCPA) limits states' discretion in the area.[122] Under the CCPA, obligors supporting family members other than those to whom the garnishment order relates, cannot have more then fifty percent of their net pay garnished.[123] Obligors with no other family members to support are subject to having sixty percent of their pay garnished.[124] When more than twelve weeks of arrearages exist, however, an additional five percent of the obligor's net pay can be garnished.[125]

Procedures for garnishing a soldier's pay are relatively simple. Initially, the support obligee must obtain the garnishment order from the appropriate state court, naming the federal agency employing the obligor as garnishee.[126] Once the garnishment order is obtained,

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[115] *Id.* § 659(a).

[116] *Id.* § 662(f).

[117] *See* 5 C.F.R. § 581.103 (1990) (If the recipient is a military retiree who is receiving military retired pay and VA disability compensation, then the amount of veterans disability compensation received in lieu of regular military retired pay is subject to garnishment unless the retiree waived all retired pay. When all retired pay is waived. then none of the disability compensation is subject to garnishment.)

[118] 42 U.S.C. § 662 (f)(2) (1988).

[119] *See* Rose v. Rose, 107 S. Ct. 2029 (1987).

[120] 42 U.S.C. § 662(g) (1988). Withholding for taxes in amounts greater than that required based on the number of personal exemptions claimed must be justified separately, *Id.* § 662(g)(3). This requirement helps prevent manipulation **of** the amount of pay subject to garnishment.

[121] 5 C.F.R. § 581.104(h)(2) (1990).

[122] 15 U.S.C. § 1673 (1988).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] 5 C.F.R. § 581.202(a) (1990).

it must be served, together with a certified copy of the underlying support order, on the employing agency's designated service of process agent by registered or certified mail.[127] In addition, the garnishment order, or correspondence accompanying the order, should include the obligor'sfull name, status (i.e., active duty, civilian, retiree, etc.), and social security number.[128]

Garnishment requires time-consuming separate court proceedings and is limited somewhat in the income it can attach in comparison to other available enforcement mechanisms. As a result, it usually is not the enforcement mechanism of choice for use against soldiers. Garnishment is, however, worth considering as an enforcement mechanism against nonmilitary, noncustodial parents. This is particularly true if the state in which the noncustodial parent resides has adopted a restrictive definition of the term "wages" for purposes of wage withholding.[129]

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[127] 5 C.F.R. § 581.202(b) (1990). The designated agents, and their addresses, for the military services and Coast Guard are:

Army:
Defense Finance and Accounting Service
ATTN: DFAS-I-GG
Indianapolis, IN 46249
(317) 542-2155

Air Force:
Defense Finance and Accounting Service
ATTN: GL
Denver, CO 80279
(303) 676-7524

Marine Corps:
Defense Finance and Accounting Service
Code G
Kansas City, MO 64197
(816) 926-7103

Navy:
Director, Navy Family Allowance Activity
Anthony J. Celebrezze Federal Bldg.
Cleveland, OH 44199
(216) 522-5301

Coast Guard:
Commanding Officer (L)
U.S. Coast Guard Pay and Personnel Center
444 S.E. Quincy Street
Topeka, KS 66683-3591
(913) 295-2984

Note that the designated agent may be different for garnishment of DOD civilian pay. For a complete listing of all designated agents in the federal government, see 5 C.F.R. part 581, app. A.

[128] 5 C.F.R. § 581.203 (1990).

[129] *See infra* note 145.

B. MANDATORY ALLOTMENTS

Mandatory allotments are available for use only against military noncustodial parents receiving active duty pay. They are, however, easy to start, can last indefinitely, and usually can be applied against a larger pool of military pay than any other enforcement mechanism.

To obtain a mandatory allotment, the custodial parent first must obtain a court or administrative order establishing a child support obligation.[130] In addition, the custodial parent must have evidence[131] that more than two months of support obligation arrearages have accrued.[132]

Assuming those prerequisites are met, the custodial parent can petition a court or child support enforcement administrative agency to send notice to the military requesting the initiation of a mandatory allotment. Custodial parents cannot make the request themselves because they are not an "authorized person."[133]

Notice to the military is made by letter sent to the appropriate military office.[134] The letter must certify that the signer is an authorized person, include the obligor's name and social security number, and also include a statement that the obligor owes more than two months of support arrearages.[135] In addition, the letter must be accompanied by a copy of the underlying support order that has been certified by the court or head of the administrative agency that entered it.[136]

Like garnishment, the percentage of pay that can be attached through use of a mandatory allotment is limited by the CCPA.[137]

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[130] 32 C.F.R. § 54.4 (1990) (note that the obligation also can be established through an order for *both* child and spousal support).

[131] This evidence is easy to obtain when child support is ordered to be paid through the court or a state administrative agency. It is more problematic when payments are supposed to be paid directly to the custodial parent. In those cases, the custodial parent should submit an affidavit to the court or administrative agency that issued the support order attesting to the amount of the arrearages.

[132] 32 C.F.R. § 54.4 (1990).

[133] Typically, a child support enforcement agency agent. Other state employees are "authorized persons," however. *See id.* § 54.3(a).

[134] The letter is sent to the same officials authorized to receive garnishment orders. *Id.* §§ 54.6(a), 54.6(b).

[135] *Id.* § 54.6(a)(5)(iii). Arrearages exceeding 12 weeks should be noted in the letter to take advantage of the higher percentage of net pay that can be attached under the CCPA. *See supra* note 125 and accompanying text.

[136] *Id.* § 54.

[137] *See supra* notes 122-25 and accompanying text.

Under identical circumstances, however, the amount of pay that actually can be attached as a result of a mandatory allotment is usually larger than that paid through garnishment. Unlike garnishment, BAQ and BAS frequently are included in the definition of net pay.[138] Arrearages already accrued under the original support order also can be collected by involuntary allotment, but a second court or administrative order specifically ordering payment of the arrearages is required.[139]

Because no additional court or agency proceeding is necessary, a mandatory allotment frequently is the fastest way for a custodial parent to ensure prompt payment of an existing support order. Because they can be used only against soldiers, however, many courts and state child enforcement agency agents are not familiar with the requirements and process of obtaining one. As a result, legal assistance attorneys should consider sending model requests for initiating an involuntary allotment directly to the court or child support enforcement agency concerned. A sample request is at Appendix A to this article.

Legal assistance attorneys also must be prepared to assist soldiers against whom a mandatory allotment is being sought. Soldiers have thirty days to present a defense after being notified by their finance office that a mandatory allotment is being sought.[140] To succeed in stopping the allotment's initiation, the soldier must present substantial proof that the information contained in the request to initiate the mandatory allotment is in error.[141] This proof must be in the form of supporting affidavits and other documentary evidence[142] showing that the support payments are not delinquent or that the underlying support order has been amended, superseded, or set aside.[143]

C. STATE WAGE WITHHOLDING ORDERS

Since November 1, 1990, virtually[144] all support orders issued or modified in IV-D cases are required to have provisions for mandatory

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[138] *See* 32 C.F.R. § 54.6(b) (1990).
[139] *Id.* § 54.6(a)(1)(iii).
[140] *Id.* § 54.6(d)(5).
[141] *Id.* § 54.6(d)(7)(iii).
[142] *Id.*
[143] *Id.* § 54(d)(5).
[144] The requirement is excused if the court or agency finds good cause not to require the automatic withholding or the parties make other arrangements in writing. *See* 42 U.S.C. § 666(b)(3)(A) (1988).

wage[145] withholding.[146] All other support orders issued or modified after October 1, 1985, are required to have provisions providing for automatic wage withholding conditioned on the accrual of one month's arrearages.[147] The amount of wages subject to assignment is the lower of the CCPA or the amount prescribed by state law.[148]

Military finance centers process state wage withholding orders the same way as garnishment orders and subject the same pay to withholding.[149] Wage withholding orders that are conditioned on the existence of an arrearage are honored by finance centers only if issued by a state court.

All states are required to provide methods for honoring foreign state wage assignment orders. The Model Interstate Income Withholding Act[150] largely mirrors the federal requirements[151] for interstate withholding in IV-D cases. Still, uniformity of procedures to initiate a state wage withholding order vary widely from state to state, as do the procedures for enforcing one state's order in another state.

While state wage assignment orders offer a client no particular advantage in seeking support from a soldier, they can be very valuable to a client seeking child support from a civilian noncustodial parent. Like mandatory allotments, wage assignments can be activated administratively, rather than requiring an additional contested hearing. Equally important is the fact that support collections pursuant to wage assignment orders "must be given priority over any other legal process under [s]tate law against the same wages."[152]

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[145]Each state defines what constitutes a "wage." *Id.* § 666(b)(1). Some states have defined wages to be income from virtually any source derived. ***See.*** *e.g.*, Mich. Comp. Laws Ann. § 552.602(b) (West 1988).

[146]42 U.S.C. § 666(b)(3)(A) (1988).

[147]*Id.* § 666(a)(8). Effective January 1, 1994, states must provide for mandatory wage withholding in *all* cases involving child support absent a court or agency finding that good cause exists not to require the withholding or the parties reach a written agreement providing other means of preventing arrears from accumulating. ***See id.*** § 666(a)(8)(B).

[148]*See supra* notes 122-25 and accompanying text.

[149]*See* ***supra*** notes 121-22 and accompanying text.

[150]This model act has been adopted substantially through statute or regulation by a number of states, including Delaware, Kansas, Louisiana, Michigan, Missouri, Oregon, South Carolina, Tennessee, and Texas.

[151]*See* 45 C.F.R. § 303.100(g) (1989).

[152]42 U.S.C. § 666(b)(7) (1988).

D. THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

If the noncustodial parent is a military retiree, another support enforcement mechanism available is the Uniformed Services Former Spouses' Protection Act (USFSPA).[153] Unlike other available enforcement mechanisms, custodial parents can initiate action under USFSPA entirely by themselves. Moreover, arrearages are not required.

To initiate collection actions under the USFSPA, a custodial parent must send the appropriate designated agent[154] a signed DD Form 2293, Request for Former Spouse Payments from Retired Pay,[155] or a letter requesting that the amount due in support be withheld from the retiree's pay and sent directly to him or her. Unless personally served, the request must be sent by certified or registered mail, return receipt requested.[156]

The former spouse also must enclose a copy of the underlying court decree, certified by court personnel within ninety days of service on the designated agent,[157] that provides for payment of child support.[158] If the court order was issued while the retiree was still on active duty, and he or she was not represented in court, then the court order or other court documents supplied with the court order must certify that it complied[159] with the Soldiers' and Sailors' Civil Relief Act.[160]

If the former spouse's request for withholding is made by letter, the letter must include the following:

1. A statement that the court order has not been amended, superseded, or set aside.
2. The retiree's full name, social security number, and former Uniformed Service.

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[153]The USFSPA is codified in various sections throughout title 10 of the U.S. Code. That portion of the USFSPA dealing with payment of disposable retired pay to satisfy child or spousal support is found at 10 U.S.C. § 1408 (1988).

[154]32 C.F.R. § 63.6(b)(5) (1990). Notices for the military services and the Coast Guard should be sent to the addresses listed *supra* note 127.

[155]This form is available at local military finance offices.

[156]32 C.F.R. § 63.6(b)(3) (1990).

[157]*Id.* § 63.6(c)(2).

[158]*Id.* § 63.6(b)(ii).

[159]*Id.* § 63.6(c)(4).

[160]50 U.S.C. app. §§ 501-591 (1988).

3. The full name, address, and social security number of the former spouse.
4 A statement that the former spouse agrees that she and her estate are personally liable for any future overpayments, and that overpayments can be recovered through use of involuntary collection methods.
5 A statement that the former spouse agrees to notify the designated agent promptly if the operative order is vacated, modified, or set aside. Notice also must be given if the child for whom support is provided in the order is no longer eligible for support due to emancipation, adoption or death.[161]

Payments usually will commence within ninety days if all the necessary steps to initiate withholding are followed.[162]

Certain limitations exist to the use of the USFSPA to collect child support. Only "disposable retired pay" is subject to withholding.[163] Most courts agree that retirees who have waived retired pay in lieu of veteran's disability payments can shield a significant portion of their gross retired benefits from attachment under the USFSPA.[164] Moreover, only fifty percent of disposable retired pay can be attached without a garnishment order.[165] Finally, support arrearages can be

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[161] 32 C.F.R. § 63.6(b) (1990).

[162] *See id.* § 63.6(b)(4).

[163] "Disposable retired pay" is defined as:

> . . . the total monthly retired pay to which a member is entitled less amounts which—
>
> **(A)** are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (C) in the case of a member entitled to [military disabled] retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (D) are deducted because of an election under chapter 73 of this title [10 U.S.C. § 1431-1452] to provide an annuity to a spouse or former spouse to whom a payment of a portion of such member's retired **or** retainer pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (1988).

[164] *See* Mansell v. Mansell. 109 S. Ct. 2023. 2028 (1989) ("under the Act's [USFSPA's] plain and precise language, state courts have been granted authority to treat disposable retired pay as community [or marital] property; they have not been granted authority to treat total retired pay **as** community [or marital] property").

[165] 32 C.F.R. § 63.6(e) (1990).

collected using the USFSPA only to the extent they are ordered satisfied in the underlying order and also quantified in the order or in ancillary court documents.

Military retirees notified of a request for withholding have thirty days to respond before military finance authorities begin withholding.[166] Defenses to withholding are limited. Retirees must present the designated agent with court-certified documents showing that the ex-spouse's underlying support order has been vacated, modified, or otherwise set aside.[167]

E. TAX REFUND INTERCEPTS

Unlike the other enforcement mechanisms previously discussed, the sole focus of tax refund intercepts is the collection of support arrearages. Federal law requires that both federal and state income tax refunds be subject to tax refund intercepts or set-offs for child support arrearages owed to IV-D clients.[168]

Currently, the federal intercept program is available only to those IV-D clients receiving AFDC.[169] Clients receiving AFDC, however, must assign to the state their right to collect support from the noncustodial parent.[170] As a result, the client will receive little benefit by pursuing the possibility of a federal intercept unless the client has been receiving AFDC payments only recently or the AFDC arrearages are small in comparison to total arrearages owed the custodial parent.

Requirements to use state intercept programs are matters of state law. If a client qualifies for the state program, careful consideration should be given to timing the request to maximize the benefit. If the attorney anticipates that the noncustodial parent's state tax refund will be small, or if arrearages are relatively small, it would be wise to defer making the request until another year. Unless the state has enacted its own limit, no cap exists on the amount of arrearages that can be collected through use of a tax intercept. Because the non-

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[166] *Id.* § 63.6(f)(iii).

[167] *Id.*

[168] 42 U.S.C. §§ 664, 666(a)(3) (1988).

[169] Congress provided for non-AFDC recipients to use the federal tax intercept program. It applied, however, only to federal tax refunds payable after December 31, 1985, and January 1, 1991. ***See id.*** § 664(2).

[170] *See supra* note 18.

custodial parent can defeat it fairly easily by changing the number of withholding exemptions claimed, the tax intercept normally can be used only once.

Noncustodial parents who are the subjects of either a federal or state tax intercept will receive notice of the proposed intercept and an opportunity to contest it.[171] Defenses to the intercept, however, are limited to contesting the amount of the arrearage or claiming that some portion of the refund is owed to a joint filer.[172]

F. LIENS

A lien is a means of encumbering the transfer of property, real or personal. Like tax intercepts, liens are another method that can be used to secure the payment of child support arrearages. Under federal law, all states are required to have "procedures under which liens are imposed against real and personal property for amounts of overdue [child] support."[173]

Federal law does not dictate the types of liens used or the procedures that must be followed to obtain one. As a result, states differ substantially in their requirements for perfecting the lien and also in what actually is secured by the lien. In general, however, liens are activated or "perfected" through "recording." Recording is accomplished by filing the necessary papers required by local law in the appropriate office. Usually, liens must be recorded in the county where the debtor's property is located or registered. Some states, however, have created a central registry for liens, eliminating the need for multiple recordings.[174]

Some states allow the lien to be "perfected" by recording the support order.[175] In those states, no default in making support payments is required to cloud the noncustodial parent's title in the affected real or personal property. Other states, however, require that there be an actual default and accrual of arrearages before a lien can be perfected through recording.[176] These differences are significant.

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[171] 42 U.S.C. §§ 664(a)(3)(A), 666(a)(3)(A) (1988).
[172] *Id.*
[173] *Id.* § 666(a)(4).
[174] *See, e.g.*, Fla. Stat. Ann. § 61.1352 (West 1988)
[175] *See, e.g.*, Cal. Code. § **4383** (West 1991).
[176] *See, e.g.*, Vt. Stat. Ann. tit. 15 § 791 (1991).

The general rule is that liens perfected "first in time" take priority over other judgment liens and unsecured creditors. Priority becomes critical when the debtor's equity in the encumbered property is not sufficient to satisfy all liens recorded against it. Once the equity is exhausted, lien holders of lower priority receive nothing when the property is sold. With the advent of automatic wage withholding,[177] the failure of noncustodial parents to make support payments will often postdate the onset of other financial default. These other defaults often will give rise to judgment liens being recorded against the noncustodial parent's property.

In those states in which an arrearage must accrue before the lien can be recorded, the custodial parent likely will lose any "race to the courthouse" to achieve a high priority lienholder status. Moreover, in states that require arrearages before allowing the recording of a lien, multiple recordings may be necessary to secure arrearages as they accumulate.[178]

Merely recording the lien results in no payment to the custodial parent. Payment to the custodial parent often occurs only when the noncustodial parent sells the property and needs the lien released, or, when state law permits, the custodial parent forecloses the lien or uses "levy and sale under writ of execution" procedures.

Forced sales, however, are usually expensive to conduct and frequently result in sales prices below the amount of the noncustodial parent's equity in the property. Moreover, consideration should be given to the impact of a forced sale on a noncustodial parent's ability to make future support payments. Forcing the sale of the noncustodial parent's automobile may cause the parent to lose his or her job, creating a change of circumstances that justifies a lowering of the support obligation.

Legal assistance attorneys with noncustodial clients facing forced sales of property to satisfy a lien should become familiar with the state's debtor protection provisions. States commonly allow debtor's time to redeem foreclosed or levied property and include exemptions on the type of property that can be sold at a forced sale. Some states provide that property at a forced public sale cannot be sold substantially below fair market value price.

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[177] *See supra* notes **144-47** and accompanying text.
[178] *See, e.g.*, Mich. Comp. Laws Ann. § 552.625 **(West** 1988).

Ultimately, however, the optimal solution is to negotiate a release of the lien following satisfaction of accrued arrears. In this regard, attorneys representing either custodial or noncustodial parents should be familiar with the proper methods of releasing a lien under applicable state law.

V. CONCLUSION

Today, many American families are dysfunctional. Inadequate financial support of these families' children has become a matter of national concern.

The military community is distinct and separate from the civilian community in numerous ways. Soldiers and military retirees are not, however, immune from the social forces and trends that shape the rest of American society. Not surprisingly, increasing numbers of soldiers and military retirees are either custodial parents or noncustodial support obligors. AR 608-99 cannot resolve many of the issues facing these potential clients. Therefore, legal assistance attorneys must become familiar with the mechanisms available under federal and state laws to provide children and their custodial parents with adequate financial support.

Appendix A
Sample Mandatory Allotment Request Letter
[Agency Letterhead]

Commander
[Finance Center]*

Reference: CPT I.M. Late, 555-55-5555, U.S. [Army, [Navy, Air Force, etc.], (unit (if known)).

Dear Sir:

I request initiation of a mandatory allotment from Captain Late's active duty pay in the amount of $ XXX.OO pursuant to 42 U.S.C. § 665.

Captain Late is subject to a court order requiring him to pay $XXX.00 per month as periodic child support. A certified copy of

this order is enclosed.** He has failed to fully meet this obligation, and his arrearages exceed the total support payable for a two-month period under the order. [Moreover, a portion of the arrearage is more than twelve weeks overdue***].

Payment should be made to the following address:

[Insert the full name and address for the person or agency that is to receive the allotment—or, payment can be directly to the custodial parent]

Please continue the allotment until _____ [insert the date child will be emancipated by reason of age under state law] or otherwise advised by this agency.

I certify that I am an "authorized person" as that term is defined in 42 U.S.C. § 665 and **32** C.F.R. part **54.** I am an agent of a state with an approved Title IV-D program under the Social Security Act, and my duties include seeking recovery of amounts owed as child support or child and spousal.support. Thank you for your attention to this matter.

Sincerely,

State Child Support
Enforcement Agent

Enclosure [copy of support order certified by the clerk of court or head of the administrative agency that issued the order]

**See* 32 C.F.R. § 54.6(f) (1990).

**Arrearages under the order also can be collected through the allotment, but this requires a second court or administrative order specifically ordering payment of the arrearages. *See* 32 C.F.R. § 54.6(a)(1)(iii).

***Addingthis language, if applicable, will increase the percentage of monthly pay that may be attached through this procedure. *See* **15** U.S.C. § **1673** (1988); **32** C.F.R. § 54.6(a)(5)(iii) (1990).

PROVING PATERNITY BY PRESUMPTION AND PRECLUSION

by Mark E. Sullivan*

I. INTRODUCTION

Private Bill Soldier was the last client of the day when he entered the legal assistance office at Fort Bragg, North Carolina. He explained to his legal assistance attorney, Captain Lawyer, that he had been served with some papers accusing him of being the father of a certain child, and he wanted to know what his rights and defenses were.

Without further questioning, Captain Lawyer started an overview of the paternity process for Private Soldier. His advice, much like that given by other Army legal assistance attorneys, touched on three main points.

First, the matter of paternity claims is covered in Army Regulation 608-99.[1] Under paragraph **3-2** of the regulation, the soldier must be allowed an opportunity to talk with a legal assistance attorney about his legal rights and obligations. Under paragraph **3-3** of the regulation, no action by the command may be taken without a court order unless the service member admits paternity and is willing to provide support for the child.

A second important point is that current developments in tissue testing (commonly called "blood tests") make the proof of paternity by scientific means much easier today. One of the major innovations in this area is human leukocyte antigen (HLA) testing.[2] HLA testing first became available in the late 1970's.The scientific community views it as a reliable and accurate test for the exclusion of paternity, and accepts it as over ninety-nine percent accurate in the

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[1]Army Reg. 608-99, Personal Affairs: Family Support, Child Custody, and Paternity (22 May 1987) [hereinafter AR 608-99].

[2]Brown and Loomis, *Counseling the Putative* ***Father: A*** *Legal Assistance Overview to Disputed Paternity*, The Army Lawyer, Oct. 1982, at 9.

exclusion of falsely accused potential fathers.[3] As another means of scientific proof, DNA testing is even more revolutionary in its impact upon paternity litigation. Although early claims of accuracy with a margin of error of one in three billion have been abandoned, DNA testing is still a highly reliable and accurate method of tissue testing for paternity and other purposes.*

Finally, Private Soldier should be counseled about the child'srights to military benefits,[5] as well as his rights and duties regarding custody and visitation.[6]

II. DISCUSSION

A. NONSCIENTIFIC ESTABLISHMENT OF PATERNITY

This advice would suffice in many cases. It ignores, however, an older approach to proving paternity that isjust as reliable and practical today as it was a century ago. The nonscientific proof of paternity originates in concepts of res judicata, equitable estoppel, and the presumption of legitimacy. While certainly less exciting than today'sscientific technology for proof of paternity, these valuable tools also should be considered by the legal assistance practitioner.

This article provides an overview of paternity proof by means of presumption, claim or conduct, agreement, and adjudication. Understanding these concepts will give the legal assistance attorney a valuable additional insight for counseling paternity defendants and claimants.

The logical first step at this stage is to determine the nature of the mother's claim against Private Soldier and the relationship (if any) of the parties. Are they joined together by the bonds of matrimony. or only by the parentage claims of a child? Has Private Soldier ever acknowledged or legitimated the child? Have the parties been divorced already'? Has Private Soldier formally acknowledged the child,

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[3]Moore v. Haseeza, 212 N.J. Super. 399, 401, 515 A.2d 271, 272 (N.J. Super. Ct. Ch. Div. 1986).

[4]*See, e.g.*, Cobey v. State, 80 Md. App. 31, 559 A.2d 391 (1989); Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988); People v. Wesley, 140 Misc. 2d 306, 533 N.Y.S.2d 643 (N.Y. Co. Ct. 1988).

[5]Martin, *Legal Rights of the Illegitimate Child*, 102 Mil. L. Rev. 67, 75 (1983).

[6]Martin, *Legal Rights of the Unwed Father*, 102 Mil. L. Rev. 77, 80-82 (1983).

agreed to support the child, or been listed as the father on the birth certificate? The answers to these questions will help determine whether paternity has or can be proven by presumption, claim or conduct, agreement, or adjudication.

B. PRIOR MARRIAGE AND DIVORCE

Suppose, for example, that a prior divorce judgment names Private Soldier as the father of a child and that his former wife is now suing him for child support. In this case, the advice given to him would be radically different than that stated above. The new advice would focus completely on the issue of res judicata, and Private Soldier would be advised that any motion for blood tests probably would be denied based on the res judicata effect of a divorce judgment finding him to be the father of the child.[7]

An example of this res judicata effect is found in a 1987 Ohio case, *In re Gilbraith*.[8] In that case, a child was born out of wedlock. One year later the mother married. One-and-a-half years later the mother and her husband were divorced. The divorce petition of the husband, the separation agreement of the parties, and the divorce decree referred to the child as the husband's. The decree and the separation agreement provided for child support. At the time of the divorce, the husband also legitimated the child as his own in a proceeding in the probate court. At a later contempt hearing regarding the husband's nonpayment of child support, the husband attempted to deny paternity.

In its decision, the Ohio Supreme Court answered in the affirmative "[t]he fundamental question presented to us. . .[of] whether the judicially created doctrine of ***res judicata*** can be invoked to give conclusive effect to a determination of paternity contained in a dissolution decree or a legitimation order, thereby barring a subsequent paternity action."[9]

The court paid particular attention to the salutary ends of the doctrine of res judicata, which assures that "all litigation has a reasonable ending point and. . .[which prevents] a party from having to

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[7]Dorton v. Dorton, 69 N.C. **App.** 764, 318 S.E.2d 344 (1984); Sutton v. Sutton, 56 N.C. **App.** 740, 289 S.E.2d 618 (1982); Williams v. Holland, 39 N.C. **App.** 141, 249 S.E.2d 821 (1978).

[8]32 Ohio St. 3d 127, 512 N.E.2d 956 (1987).

[9]*Id.*, 512 N.E.2d at 959.

contest the same issue or cause more than once.''[10] In accomplishing final settlement between the parties, the doctrine "effectively promotes stability, certainty, respect, consistency and finality, both in individual judicial determinations and in the legal system as a whole."[11]

The court next focused on the particular application of the principles of res judicata to the area of paternity litigation. It stated that, in those legal actions

> where the matter of parentage is determined with finality and the absence of fraud, and where that determination is not later vacated, either on direct appeal or pursuant to a recognized legal remedy. . . , the policy of this State requires, in sum, that the parent-child relationship be shielded from the unsettling affects of further judicial inquiry, and that relitigation of parentage be barred, as a general rule, in any subsequent actions. . . .[12]

In another case, ***Decker*** *v. Hunter*,[13] decided in 1984 by the Florida District Court of Appeal for the Third District, the parties were divorced and the judgment named the husband as the father of the child. The judgment incorporated an alimony, child support, and property settlement entered into by the parties. Upon the ex-husband's denial of paternity in a later proceeding for contempt for failure to pay child support, the trial court ordered the mother, the father, and the child to submit to an HLA blood test. The order also suspended the child support payments of the ex-husband pending the outcome of the blood tests.

Upon appeal by the mother, the orders below were vacated. The Court of Appeal stated that

> [i]f an alleged father has doubts concerning the paternity of a child born during the marriage, he should raise and resolve those doubts during the dissolution proceeding. . . . The divorce action involved an identity of the cause of action and parties and involved the same issue as the father now attempts to relitigate. Therefore the final judgment of divorce is now res judicata and bars any redetermination of the paternity of the child.[14]

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[10] *Id.* at 960.
[11] *Id.* at 961.
[12] *Id.*
[13] 460 So. 2d 1014 (Fla. Dist. Ct. **App.** 1984).
[14] *Id.* at 1015.

C. CURRENT MARRIAGE

A different analysis—but ultimately the same result—may occur when the parties currently are married and Private Soldier is attempting to defend against his wife's claim of paternity regarding a minor child born to her. Because a marriage between the parties invokes the presumption of legitimacy for any child born during the marriage, one must look at the husband's conduct to determine whether he will be able to defeat this presumption by obtaining scientific proof of paternity.

In *Johnson* v. *Johnson*,[15] decided by the Michigan Court of Appeals in 1979, the child was conceived before the marriage at about the same time plaintiff and defendant met. The parties married three-and-a-half months before the birth of the child. When the plaintiff filed for divorce, his verified complaint stated that the child was his. A brief trial occurred and no blood tests were done. The defendant-mother stated that she was unsure whether the child was her husband's. Plaintiff was shown on the birth certificate as the child's father, and he supported the child from birth until the suit for divorce nine years later.

In reversing the trial court's judgment that the husband was not the father of the child, the Court of Appeals pointed out that, under Michigan law, the presumption of legitimacy is viable and strong, although rebuttable, and that it may be overcome only by clear and convincing evidence.[16] Under these circumstances, the fact of marriage, according to the court, makes out a prima facie case of paternity. A child who is born during wedlock is entitled to the benefit of this protection. The court found that the presumption of legitimacy, "one of the strongest presumptions known in the land,"[17] was not rebutted by the mother's testimony that she was unsure whether the husband was the father of the child.

In addition, the issue of equitable estoppel was raised, and the court held that the husband was estopped from denying paternity. In explaining this estoppel to deny parentage, the court stated that the plaintiff married knowing that the defendant was pregnant and that he was possibly the biological father. Plaintiff also held himself out as the father of the child for at least nine years. Even if he were

[15] 93 **Mich. App.** 415, 286 N.W.2d 886 (1979).
[16] *Id.*, 286 N.W.2d at 887.
[17] *Id.*

not the father of the child, by marrying the defendant he prevented her from obtaining support from the child's true biological father; actions under Michigan's paternity statutes are authorized only when the woman was unmarried during the period from the conception of the child to the date of the child's birth. Because the "plaintiff has represented himself as the father of this child for nine to ten years, he may not now say that he was not."[18]

A similar result was reached in the District of Columbia Court of Appeals in *S.A. v. M.A.*,[19] a 1987 decision involving parties who married in 1971, separated in 1974, but continued intermittent sexual relations through 1985. A child was born in 1979, and a hearing was conducted in 1985, at which time the court found that the husband was the father of the child. The court relied on the presumption of legitimacy for a child during the marriage, the wife's testimony of exclusive access by her husband, and a six-year period of representations of paternity by the husband. The court specifically rejected the husband's testimony regarding his "nonresemblance" to the child and refused to believe the husband's claim of his wife's adultery (allegedly confessed to him). Finding that the proof of paternity was sufficiently well-established, the court stated that the good cause needed for ordering blood tests for paternity amounted to a reasonable basis or "probable cause," something not met by the "mere suspicion" set up by the husband in defense.

The court looked closely at the length of time between the child's birth and the denial of paternity. Finding that the husband first denied paternity almost six years after the child's birth, the court stated that "[t]he untimeliness of appellant's disavowal of paternity severely undercuts the credibility of his claim and operates, at a minimum, as a factor in assessing the reasonableness of ordering HLA testing in this case."[20] The court also found that the history of the husband's admissions of paternity and his behavior toward the child might very well operate as an equitable estoppel to bar him from denying parentage, and as an affirmative defense against a request for blood testing.[21]

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[18] *Id.* at 888.
[19] 531 A.2d 1246 (D.C. 1987).
[20] *Id.* at 1254.
[21] *Id.* at 1254-55 (citing Fuller v. Fuller, **247** A.2d 767 (D.C. 1968). *petition denied*, 418 F.2d 1189 (1969); and Golser v. Golser, 115 A.D.2d 695, 496 N.Y.S.2d 521 (1985)).

D. OUTER LIMITS

How far can the presumption of legitimacy go? Can it survive an exclusion by paternity blood testing? Can it overcome the assertions of the wife herself that the child is not "of the marriage"?

The issue of contrary blood tests results is found in a 1985 New Jersey Supreme Court case, *M.H.B. v. H.T.B.*[22] The child was born during the marriage. Three months later, the husband learned that the wife had had an affair, and he moved out. The defendant publicly represented himself as the child's father, and he was shown as the father on the birth certificate. His settlement agreement provided for terms of custody, visitation, and child support regarding all three children born during the marriage. Later, the ex-husband petitioned for custody of all three children. Only as a plea in the alternative did he ask for relief from support of the daughter alleged to be not of the marriage and seek to relitigate the issue of paternity as to this child. When the mother agreed to blood tests, the tests proved that the ex-husband could not have been the biological father of this child.

Casting this finding aside, the trial court decided that the doctrine of equitable estoppel was applicable to preclude the former husband from denying his duty to provide child support on behalf of a child fathered by another. The court's framework for analysis of the issue of equitable estoppel stemmed from *Miller v. Miller*,[23] in which the court held that, before a duty to pay child support could be imposed by the court based on equitable considerations, "it must be first shown that, by a course of conduct, the stepparent affirmatively encouraged the child to rely and depend on the stepparent for nurture and financial support."[24] In *Miller* the court held that the stepfather could be equitably estopped from denying his duty to provide child support to his stepchildren if it could be shown that they would suffer financial harm if he were permitted to repudiate the parental obligations that he had voluntarily assumed.

The court in *M.H.B. v. H.T.B.* reviewed the longstanding conduct of the ex-husband who, from the time of the child's birth, "engaged in a voluntary and knowing course of conduct and with respect to [her], which constituted in its purpose and effect an affirmative representation that he was her natural father."[25] Finding that abun-

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[22]100 N.J. 567, 498 A.2d 775 (1985).
[23]97 N.J. 154, 478 A.2d 351 (1984).
[24]*Id.* at 169-70, 478 A.2d at 355.
[25]*M.H.B.*, 498 A.2d at 780.

dantly clear evidence existed that the child and her mother relied on the ex-husband's purposeful conduct and depended on him for support, the court further found that the child's reliance was detrimental in the sense of the financial and personal harm she would suffer if he were allowed to "disavow his representations, repudiate the expectations he created, and evade the responsibilities he had assumed."[26] Using this analysis, the court set up an equitable estoppel that acted as a bar to prevent the ex-husband from litigating the paternity issue.

In another unusual case, *T.D.D. v. M.J.D.D.*,[27] the Florida District Court of Appeal for the Fourth District reviewed the case of a husband and wife who had had sexual relations before marriage and then married after she told him that she was pregnant and that the baby was his. She petitioned for divorce about five years later, alleging that the child was born of the marriage and asking for custody of the child in a verified petition. The parties later entered into a stipulation regarding custody, support, and visitation. Only at the hearing on the uncontested divorce did the wife indicate her dissatisfaction with visitation rights and raise the question of paternity. She later amended her pleadings to challenge the husband's claim of paternity and to request blood tests.

The trial court ordered the husband to submit to HLA blood-testing. The appellate court reversed, stating that the first issue was whether the wife was estopped from challenging the husband's paternity of the minor child because she represented that her husband was the father of the child, induced him to marry her, concealed her relations with the potential biological father of the child, accepted the benefits of marriage and the husband's support for herself and the child, and swore in her petition for dissolution (and confirmed in the stipulation of settlement) that the husband was the child's father. Based on the above, the court reversed the order for HLA blood-testing and remanded the case for determination of the estoppel issue.

E. EQUITABLE ESTOPPEL

Equitable estoppel is an alternative to res judicata. It applies when no authoritative final decree exists. It relies on the claims or conduct of a party for its binding effect and ordinarily is invoked when a long period of time has elapsed before the denial of paternity; equi-

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[26] *Id.*

[27] 453 *So.* 2d 856 (Fla. **App.** 1984)

table estoppel seldom is found in cases involving marriages of short duration.

In *Berrisford v. Berrisford*[28] the child was born three months after the marriage of the parties, which was in August 1978. The divorce petition was filed in October 1979. In the divorce action, the husband at first claimed paternity of the child. The husband was listed as the child's father on the birth certificate, and the pleadings of both parties were verified. Four months later, in February 1980, the husband first raised the issue of nonpaternity. The trial court denied the husband's motion for admission of blood tests. Both parties testified at trial that the child was not the husband's.

In its decision, the Supreme Court of Minnesota quickly laid to rest the issue of false swearing, finding that the possible perjury of the parties at trial did not amount to a bar to the use of blood tests for determining paternity. Rather, the court stated, it underscored the need for more reliable blood tests for proof of paternity.

The court further found that Minnesota's statutes, despite a presumption of paternity, stated that the public policy of the state was to encourage the use of blood test evidence when paternity is in issue. Because no prior order existed, the issue of res judicata was not present. Although a presumption of legitimacy existed, the case law in Minnesota, even after the adoption of the Uniform Parentage Act, allowed for the rebuttal of this presumption.

The only remaining issue to decide was that of equitable estoppel. The court noted that some courts

> have held that estoppel should be invoked if the evidence establishes that a husband represented to his wife's child that the husband was the child's father, that the husband intended the representation to be accepted and acted upon by the child, that the child relied upon the representation and treated the husband as his father, and that the child was ignorant of the true facts.[29]

In this case, however, the court found that the facts did not permit estoppel. The husband assumed his paternal role during a relatively short period of time when the parties lived together with a child so

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[28]322 N.W.2d 742 (Minn. 1982).
[29]*Id.* at 745 (citations omitted).

young that she could not have given much thought to the nature of her relationship with him and could not have relied on any representation that could be inferred from his conduct. Lacking a good fact situation that would allow equitable estoppel to ''prove paternity" by barring the blood tests that might disprove it, the court fell back on the need for the parties and the child to submit to blood tests. The blood tests were to be performed within a period of sixty days, during which the visitation rights and support duties of the husband would be suspended. The court directed that, after the results of the tests were obtained, the trial court would be required to consider them together with the other evidence on the issue of whether the ex-husband was the child's biological father.

A similar result rejecting the doctrine of equitable estoppel was found in *Fuller v. Fuller*,[30] in which the child was born three months before the marriage. The husband had been listed as the father of the older child on the birth certificate approximately one month after the marriage. About two years after the marriage, a second child was born to the parties. The following week the parties separated. Neither party alleged that the first child was the husband's. When the mother instituted divorce proceedings about two years later, however, she sought support for both children. The trial court held that the husband was under no legal duty to support the older child.

The court held that an agreement to support or care for a child was not equivalent to a contract to adopt or to support the child after divorce. The court further held that the placement of the husband's name on the birth certificate was not evidence of a contract to support the child. The court also rejected a doctrine of "equitable adoption," finding that adoption is a specific remedy that is strictly governed by statutes and that must be followed closely to accomplish a valid adoption.

The court next addressed the argument that equitable estoppel could preclude the husband from denying his duty to support the prenuptial child. The court stated that

> [e]quitable estoppel *to* deny a duty to support can be invoked only upon a showing that there was an express or implied misrepresentation of fact inducing another to alter his position to his prejudice. The record before us. . .does not evince such a misrepresentation on the part of appellee toward the child as would warrant the application of equitable estoppel in the circumstances of this case.[31]

[30] 247 A.2d 767 (D.C. 1968).
[31] *Id.* at 769 (citation omitted)

In reaching this decision, the court noted that equitable estoppel can run only in favor of the child, and any misrepresentation made by the husband in regard to the birth certificate was not made to her. The court also disregarded the fact that the child referred to the appellee as "Daddy." Finally, unlike the situation in *Johnson v. Johnson*, the court noted that the husband's marriage to the mother of the prenuptial child did not impair her ability to obtain support from the natural father under the District of Columbia Code, and thus no finding of financial harm or detriment could be made.

The above cases outline the possible bars to blood-testing that exist in parentage cases. The effect of presumptions, claim or conduct, agreement, and adjudication are an important part of the legal assistance attorney's advice to paternity defendants.

F. A *SECOND EXAMPLE*

Suppose, however, that Sergeant Sandra Trooper had been the last client of the day for Captain Lawyer, and that she explained to him that her prior paternity litigation against the putative father of her child had resulted in a finding of nonpaternity. Will principles of preclusion and res judicata fully answer Sergeant Trooper's inquiry, or can Sergeant Trooper obtain a new paternity trial?

A new opportunity to establish paternity was granted in a 1983 decision of the North Carolina Supreme Court. In *Settle v. Beasley*[32] the court held that a minor was entitled to a trial on the issue of paternity and was not barred by collateral estoppel from having his day in court.

A prior action had been instituted by the local child support enforcement agency, asking for the defendant to be declared the father of the child and for child support. No blood tests were taken, and the defendant, having denied paternity, was successful.

Three years later, the child filed suit against the alleged father for a judicial determination of paternity and child support. The case was brought through a guardian *ad litem*.

Summary judgment was granted for the defendant on the ground that the prior action barred the pending suit by the child on the basis of collateral estoppel. The North Carolina Court of Appeals affirmed the trial court's judgment.[33]

[32]309 N.C. 616, 308 S.E.2d 288 (1983).
[33]Settle **v.** Beasley, 59 N.C. **App.** *735,* 298 S.E.2d 62 (1982).

On discretionary review, the North Carolina Supreme Court reversed and remanded the case for trial.[34] It held that the real party in interest in the prior paternity action was the county, acting through the child support enforcement agency, and not the child's mother, who was merely the nominal plaintiff.[35] It further held that the child was not in privity with the county, as real party in interest in the previous case, and therefore collateral estoppel did not bar his subsequent paternity action.

G. DETERMINING FACTORS

The court found several factors persuasive in reaching its decision. Neither the mother nor the child would have derived any financial gain from a determination of paternity in the prior action because that suit was brought for the economic benefit of the county. The mother was required to cooperate with the county in obtaining reimbursement for public assistance. She would continue to receive this assistance regardless of the outcome of the paternity litigation.

In addition, affirmative blood testing for paternity was not available in North Carolina until a year after the prior case was tried. This was found by the court to be a "powerful tool not available to plaintiff in this action."[36]

The court also noted that the testimony of the mother or her husband (the presumed father) was incompetent in the prior action under ''Lord Mansfield's Rule." This rule, which barred testimony from either party that would bastardize the child born during their marriage, was abrogated by statute one year after the prior litigation, and the court found this likewise to be "a substantial aid to plaintiff in this action which was not available at the prior trial.''[37]

Finally, the North Carolina Supreme Court found that the child had an important interest at stake in the pending litigation that would "dramatically affect his personal interests.''[38] The court cited matters such as inheritance rights, custody, support, and the right to an accurate family medical history.[39]

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[34]*Settle*, 309 N.C. 616, 308 S.E.2d 288 (1983)
[35]*Id.* at 618, 308 S.E.2d at 289.
[36]*Id.* at 623, 308 S.E.2d at 292.
[37]*Id.*
[38]*Id.* at 620, 308 S.E.2d at 291.
[39]*Id.* at 621, 308 S.E.2d at 291.

H. SIMILAR CASES

Several state courts have reached similar conclusions concerning whether a prior contested paternity action barred a subsequent suit by the child. In *Everett* v. *Everett*[40] a California appellate court held that a prior action brought by plaintiff's mother against the alleged father was not res judicata on the issue of whether defendant was plaintiff's father. The prior suit was filed by the mother (not the court child support agency), was removed from the jury and submitted by stipulation to the court, and was decided on the plaintiff's deposition and the court record. The parties waived findings of fact, conclusions of law, a motion to set aside the verdict, a motion for a new trial, and the right of appeal. That court held that a child's right to support may not be limited or contracted away by his parents. The court found persuasive the fact that the mother had compromised substantial rights in the prior action and that there was evidence of collusion in the settlement of the prior action.

A similar result was reached in *Berry* v. *Chaplin*,[41] in which the child's guardian *ad litem* brought an action for paternity and later filed a stipulation that blood tests would be conclusive on the issue of paternity. At a later hearing, the child was represented by a new guardian *ad litem* and a new attorney, who refused to dismiss the action in accordance with the stipulation when the blood tests proved unfavorable. The court of appeals held that the stipulation was invalid and that the case should proceed to trial.

In *Daniels* v. *Daniels*[42] a prior divorce judgment (including a finding of nonpaternity) was pleaded in bar of a subsequent suit by the child's guardian for paternity and support. The court concluded that the divorce judgment barred the mother, but not the child, from bringing such an action. The case was remanded for trial. The court held that the prior action did not actually decide paternity, but only estopped the mother from relitigating this issue.

Wagner v. *Brown*[43] was a case involving a prior suit in which paternity was determined, but child support was limited by statute to the sum of fifty dollars per year. After passage of a liberalized child support statute, the Florida Supreme Court held that a subsequent suit for increased child support was not barred by res judicata.

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[40] 57 Cal. App. 3d 65, 129 Cal. Kptr. 8 (1976).
[41] 74 Cal. App. 2d 652, 169 P.2d 442 (1946).
[42] 143 Cal. App. 2d 430, 300 P.2d 335 (1956).
[43] 64 So. 2d 267 (Fla. 1953)

When a prior action had resulted in a settlement between the mother and the alleged father, the Maine Supreme Judicial Court held in *Arsenault v. Carrier*[44] that the child was not estopped from bringing a later action for paternity and support because the child was not in privity with the mother in the settlement of the prior case.

In *Commonwealth Department of Social Services ex rel. Gray v. Johnson*[45] the mother had filed a civil child support action against the putative father in 1981 for two children. She had no attorney. The defendant claimed that one child was his, but he denied paternity of the other. The judge found one child to be his and held that the other was not his. No appeal of this decision was taken. Two years later, a new action was filed, with intervention by the child support agency on behalf of the child. The court sustained the putative father's plea of res judicata.

The Court of Appeals held that the prior action was res judicata as to the mother's current action against the putative father. It further held that the prior action was not res judicata as to the agency's action because the child was the real party in interest and the child was not a party to the first suit.

Similarly, in *State Division of Human Services v. Benjamin P.B.*[46] the prior action by the mother for paternity was dismissed with prejudice. Later the child brought a new paternity action against the same putative father. The Supreme Court of Appeals of West Virginia held that the prior action did not bar the child's new action because no privity existed between the parties, the child was not a party to the prior litigation, and the child was not represented by either counsel or a guardian *ad litem*. Under these circumstances, the court concluded that the dismissal with prejudice of the former action did not preclude the child from bringing a second proceeding to determine paternity.

A contrary result regarding an earlier action by a social services agency is found in *Moore v. Hafeeza*.[47] In that case, a child was born out of wedlock in 1969. The Department of Social Services filed an

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[44] 390 A.2d 1048 (Me. 1978); *see also* Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976); State *ex rel.* Fabian v. Fabian, 363 A.2d 1007 (N.H. 1976): Ford v. Ford, 191 Neb. 548, 216 N.W.2d 176 (1974): S. v. S., 595 S.W.2d 357 (Mo. App. 1980): Ruddock v. Ohls, 91 Cal. **App.** 3d 271, 154 Cal. Rptr. 87 (1979); Reimer v. Reimer, 85 Wis. 2d 375, 270 N.W.2d 93 (1978).

[45] 7 Va. **App.** 614, 376 S.E.2d 787 (1989).

[46] 395 S.E.2d 220 (W. Va. 1990).

[47] 212 N.J. Super. 399, 515 A.2d 271 (N.J. Super. Ct. Ch. Div. 1986).

action against the putative father. No record of the agency's action existed other than an annotation on the file of "No Filiation."

Almost fifteen years later, the mother of the child filed an action against the same putative father. She had not been named as a party in the previous action, but she was a witness at that time. The defendant again denied paternity and asserted defenses of res judicata and laches, among others.

The heart of the mother's claim apparently was that "newly discoverable evidence" was now available—namely, the results of HLA blood testing, which were not available at the prior trial. She claimed that she never had her day in court to prove paternity and should be allowed to use the new blood testing techniques for this purpose.

In turning down her application, the superior court denied that a new scientific test could constitute "newly discovered evidence." It found that the mother was in privity with the social services agency because their interests were similar, no adverse interests existed between them, the mother's claim was based on the same transaction or occurrence as the previous litigation, the mother had notice of the earlier action, and she had an opportunity to participate or intervene in the earlier case.[48]

The court also looked unfavorably upon the passage of almost fifteen years between the two actions. Upholding a defense of laches, the court stated that this would be allowed as a defense only when a delay existed, unexplained and inexcusable, in enforcing known rights and when prejudice resulted to the other party because of the delay. In this case

> [t]he unfairness to defendant is clear due to the passage of time. Not only has defendant been denied the right to develop a parent-child relationship with this 16-year-old child, but he has incurred other obligations that would make it unfair to now burden him with the obligation to assume some of the costs for maintaining this child.[49]

Thus the doctrines of laches and res judicata barred the subsequent claim by the mother.[50]

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[48] *Id.* at 405, 515 A.2d at 274.
[49] *Id.* at 406, 515 A.2d at 275.
[50] *See also* Dutchess County Dep't of Social Servs. *ex rel.* Marylou M. v. Gaetano C., 139 Misc. 2d 1064, 529 N.Y.S.2d 424 (N.Y. Fam. Ct. 1988).

III. CONCLUSION

The legal assistance attorney must pay particular attention to the facts in each paternity case. Prior claims or conduct may foreclose an opportunity to challenge paternity by blood testing. Prior marriage or adjudication of the claim likewise may preclude the use of today's sophisticated methods of scientific determination of paternity. **A** thorough interview, coupled with investigation and good research, are the keys to accurate advice for the client who is a defendant in paternity proceedings.

The practical results for the legal assistance practitioner of *Settle v. Beasley* and kindred cases also are very important. For the child's guardian, remember that paternity litigation is not necessarily foreclosed by the entry of a prior unfavorable judgment. The guardian must analyze the nature of the judgment (real parties in interest) and of the proceedings (settlement; representation of the child by a guardian *ad litem;* full, final and fair litigation of the issues). For the defendant's attorney, independent representation of the child is essential to deter future paternity litigation. For the child support applicant, the lessons of *Settle v. Beasley* are clear. A prior judgment of nonpaternity may not bar subsequent litigation to redetermine paternity. Close analysis of the previous action and creative strategy by counsel may lead to a new day in court, a new chance to prove paternity, and a new opportunity to obtain child support.

CONTEMPORARY APPLICATIONS OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

by Major James P. Pottorff*

"Obscure Law That Gives GIs a Break
On Rates Stirs Concern Among Banks"

I. INTRODUCTION

As this recent headline from the *Wall Street Journal*[1] suggests, the Soldiers' and Sailors' Civil Relief Act[2] (SSCRA) introduced numerous issues and challenges for creditors and legal assistance attorneys during Operations Desert Shield and Desert Storm. A significant number of these issues involved the application of the SSCRA to various financial obligations of military members. Contrary to the *Journal's* assertion, however, in military circles the SSCRA is neither obscure nor intended to provide "breaks" for service members. Instead, as this article will describe, the SSCRA is intended to counteract the adverse effects of military service. Because Desert Shield and Desert Storm deployments exceeded in size and scope any deployment since the Vietnam War, many of the questions raised had not been analyzed in almost twenty years; others were issues of first impression. Presidential activation of tens of thousands of Reserve component service members brought into focus for creditors and debtors alike several provisions of the SSCRA dealing with financial liabilities of service members.

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[1] Wall Street Journal, Aug. 23, 1990, at A2, col. 1.

[2] 50 U.S.C. app. §§ 501-548, 560-591 (1988) (as amended by the Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, ___ Stat. ___ [hereinafter SSCRA Amendments of 19911).

This article[3] will discuss application of the SSCRA to problems service members face during a major deployment and will analyze recent amendments designed to provide improved protection. Specifically, the article will discuss the purpose of the SSCRA, eligibility for SSCRA coverage, stays of proceedings, termination of leases of premises, protection from eviction, termination of automobile leases, mortgage foreclosure, interest rate limitations, retaliation for invocation of the SSCRA, payment of alimony and child support, powers of attorney, and insurance protection of professionals.

II. PURPOSE

Enacted in 1940, and amended periodically over the last fifty years,[4] the SSCRA protects those who serve their country in the armed forces. The premise underlying the SSCRA is that service members should not be disadvantaged either legally or financially when called to active service.[5] It reflects congressional efforts to give meaning and substance to that premise through legislation addressing a wide spectrum of issues and problems.

As a general rule, courts interpreting the SSCRA have been liberal in applying its protections to service members.[6] Actually, any case in which military service materially affects a service member's ability to meet financial or legal obligations may be open to corrective action under the SSCRA.[7] While the SSCRA is the result of congressional efforts to avoid the adverse effects of service, it does not address explicitly all such problems. Although financial agreements such as mortgages,[8] installment contracts,[9] and other interest bear-

[3]Parts of this article are based on research for several notes on the Soldiers' and Sailors' Civil Relief Act published in ***The*** Army *Lawyer* and the *Virginia Lawyer* ***Register.***

[4]*See, e.g.*, **50** U.S.C. app. § 526 (a 1942 amendment intended to prevent accrua! of interest in excess of six percent on preservice obligations); ***id.*** § 591 (a 1972 amendment extending the effective period of powers of attorney executed by service members subsequently declared missing in action in Southeast Asia).

[5]*See* ***id.*** § 510.

[6]*See, e.g.*, Le Maistre v. Leffers, 333 U.S. 1, 6 (1948) (purpose of SSCRA is to protect those who have dropped their own affairs and taken up the burdens of the nation); Meyers v. Schmidt, 181 Misc. 589, 46 N.Y.S.2d 420 (N.Y. Civ. Ct. 1943) (any doubt about application of the SSCRA should be resolved in favor of the service member); ***see*** *also* Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, Publication JA 260, ***The Soldiers' and Sailors'*** *Civil* ***Relief Act*** *Guide*, para. 1-5 (Jan. 1991) [hereinafter JA 260]. This publication is updated and edited by instructors in the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, Army.

[7]*See* 50 U.S.C. app. § 510.

[8]*Id.* § 532.

[9]*Id.* § 531.

ing obligations[10] receive treatment under the SSCRA, other obligations, such as child and spousal support, do not.

When no provision of the SSCRA applies to a specific problem, other, more broadly worded, provisions may be helpful. In this respect, section 510 of title 50, United States Code Appendix, is particularly useful. Section 510 states that the purpose of the SSCRA is to suspend legal proceedings and transactions "in order to enable [military service members] to devote their entire energy to the defense needs of the Nation. . . ."[11] In a judicial endorsement of this policy, the Supreme Court has stated that the SSCRA should be interpreted "with an eye friendly to those who dropped their affairs to answer their country's call."[12] This statement also reflects the approach most courts take, particularly when the person seeking relief is an activated member of the Reserve components.[13] As this article will discuss, applicability of these provisions— such as section 510—to many contemporary issues has not been established by judicial interpretation or legislative change. In these cases, when no specific provision of the SSCRA applies, a policy-based argument may be useful.

111. ELIGIBILITY FOR SSCRA COVERAGE

A. *SERVICE MEMBERS*

As a general rule, the SSCRA applies to "persons in the military service."[14] The SSCRA defines "military service" as "Federal service on active duty with any branch of service. . . ."[15] Under the SSCRA, "persons" in military service are members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force,[16] the Coast Guard, and officers of the Public Health Service detailed for duty with the Army or the Navy.[17]

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[10] *Id.* § 526.

[11] *Id.*

[12] *Le Maistre*, 333 U.S. at 6 (SSCRA tolls statute of limitations, thereby extending state statutory redemption period).

[13] *See* JA 260, para. 1-5.

[14] 50 U.S.C. app. § 511.

[15] *Id.*

[16] Technical amendments in 1991 added the Air Force to those explicitly receiving protections under the SSCRA. SSCRA Amendments of 1991, $9. Other protections in this Act that are not discussed in this article include health insurance reinstatement upon reemployment, § 5; clarification of title 38 reemployment rights coverage for reservists, § 8; and technical amendments, § 9. As a practical matter, members of the Air Force have been protected without lapse since the Air Force was made a separate Department of the Armed Services. National Security Act of 1947, ch. 343, 61 Stat. 508.

[17] 50 U.S.C. app. § 511.

Although the SSCRA does not define the composition of each of the armed services, other federal statutes in title 10, United States Code, give helpful definitions.[18] The Army of the United States includes the Regular Army, the Army National Guard of the United States, the Army National Guard while in service of the United States, the Army Reserve, and all persons appointed, enlisted, or conscripted without component.[19] Similarly, the Air Force includes the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, the Air Force Reserve, those without component, and all other units and individuals who form the basis for complete mobilization for national defense in the event of a national emergency.[20] The United States Navy includes the Regular Navy, the Fleet Reserve, and the Naval Reserve.[21] The Marine Corps includes the Regular Marine Corps, the Fleet Marine Corps Reserve, and the Marine Corps Reserve.[22] Members of the Coast Guard include the Regular Coast Guard and the Coast Guard Reserve,[23] whether actually operating with the Navy or with the Department of Transportation.[24] Consequently, Reserve component service members on active federal duty are eligible for the protections afforded by the SSCRA. Further, the SSCRA makes no distinction between those who volunteer for active service and those who involuntarily are called to active duty from the Reserve components.

Application of the SSCRA during mobilizations such as Operations Desert Shield and Desert Storm demonstrates how its protections, while not always available to career status service members, clearly apply to persons entering active service. Many provisions of the SSCRA, such as those protecting against mortgage foreclosure,[25] limiting maximum interest rates,[26] and allowing termination of leases,[27] require that service members have obligations that predate their active service. Consequently, the majority of the protections provided by the SSCRA ordinarily are unavailable to career service members because these individuals routinely enter into such legal and financial obligations during their active service.

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[18] *See generally* JA 260, para. 2-2a
[19] 10 U.S.C. § 3062(c) (1988).
[20] *Id.* § 8062(d).
[21] *Id.* § 5001(a)(1).
[22] *Id.* § 5001(a)(2).
[23] 14 U.S.C. §§ 211-213, 351, 751a, 762 (1988)
[24] *Id.* § 1.
[25] 50 U.S.C. app. § 532
[26] *Id.* § 526.
[27] *Id.* § 534.

B. PERSONS NOT IN MILITARY SERVICE

In addition to military members, the SSCRA may protect others. This protection for others has two forms. It may be derivative protection only, as described in section 513,[28] or it may include protection of dependents in their own right, as found in section 536.[29]

The first type of protection—third party or derivative protection—extends to "sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily subject to [an] obligation or liability. . . ."[30] This protection is limited to those persons who have joint liability on an obligation with another person who subsequently has entered military service. Under section 513, these persons receive the protection of any provision in the SSCRA that might "stay, postpone, or suspend" an obligation or liability.[31] Although section 513 does not contain the term "comaker," legislative history indicates that Congress intended to protect comakers as well. Congress amended this provision in 1942 and added "accommodation makers" to those receiving protections.[32] According to testimony in the House of Representatives, some interpretations of the original SSCRA were excluding comakers, and Congress intended to correct this.[33] Further, Congress also protected the banking and credit industry by including a provision that allows comakers to waive their protection under section 513.[34] Such a waiver by a comaker empowers a creditor to seek continued payment from that comaker when another comaker enters military service and is eligible for protection under the SSCRA.

Provisions that "stay, postpone, or suspend" an obligation include, but are not limited to, those that stay litigation,[35] protect against mortgage foreclosure,[36] and protect against installment contract termination.[37] Arguably, section 526, which limits interest payments under certain circumstances, also is a provision that "suspends" an obliga-

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[28] *Id.* § 513 (protection of persons secondarily liable).
[29] *Id.* § 536 (extension of benefits to dependents).
[30] *Id.* § 513.
[31] *Id.*
[32] 88 Cong. Rec. 5366-68 (1942) (testimony of Representative Kilday, Texas).
[33] *Id.*; *see, e.g.*, *In re* Itzkowitz, 177 Misc. 269, 30 N.Y.S.2d 336 (N.Y. Sup. Ct. 1941) (accommodation comaker of note signed with person now in military service was not entitled to stay of enforcement of liability).
[34] 50 U.S.C. app. § 513(4).
[35] *See, e.g.*, White System of Lafayette v. Fisher, 16 So. 2d 89 (La. 1943) (accommodation makers on military member's note received stay as persons secondarily liable).
[36] 50 U.S.C. app. § 532.
[37] *Id.* § 531.

tion. If a person meets the criteria set out in section 513, that person should receive the benefit of the appropriate stay provision in the same manner as the service member.

The second type of protection, unlike section 513, affords independent protection. Under section 536, a service member does not have to be obligated for dependents to assert some rights under the SSCRA.[38] This provision is limited, however, to the protections available in article III of the SSCRA.[39] Article III benefits include protection from eviction,[40] protection from installment contract termination,[41] protection from mortgage foreclosure,[42] and authority for early termination of leases.[43] If dependents of service members wish to avail themselves of these particular protections, they may do so regardless of whether the supporting service member is a party to the underlying obligation or liability. While the SSCRA does not define the term "dependent,"[44] dependency should be based on financial dependency on the service member, rather than on a legal definition that makes relationship to the service member dispositive.[45] Current military definitions and criteria for dependency, such as eligibility for legal assistance, should be useful in establishing who also may be a dependent under the SSCRA.[46]

IV. STAYS OF PROCEEDINGS

Section 521 of the SSCRA authorizes a state or federal court, either on its own motion or upon application by a service member, to stay a civil court proceeding.[47] Under section 521, the court must enter a stay unless military service is not materially affecting a service

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[38] *Id.* § 536.
[39] *Id.* (article III, SSCRA, includes sections 530 through 536.
[40] *Id.* § 530.
[41] *Id.* § 531.
[42] *Id.* § 532.
[43] *Id.* § 534.
[44] *See generally* JA 260, para. 4-9 (discussion of this provision and cases construing its applicability).
[45] *See, e.g.*, Balconi v. Dvascas, 133 Misc. 2d 686, 507 N.Y.S. 2d 788 (N.Y. Civ. Ct. 1986) (although ex-wife was not legally related to service member, she was still financially dependent on him and, therefore, eligible for protection from eviction).
[46] *See, e.g.*, Army Reg, 27-3, Legal Services: Legal Assistance, para. 2-4b (10 Mar. 1989) (family members eligible for legal assistance include spouses; children who are under 21; children who are under 23, enrolled in college full-time and dependent on the soldier for more than half of their support; and parents who are dependent upon the soldier for more than half their support).
[47] 50 U.S.C. app. § 521. The SSCRA applies to proceedings commenced in courts of "the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States. . . ." *Id.* § 512.

member's ability to defend or prosecute an action. The court may enter such a stay at any stage of a proceeding in which a service member is either a plaintiff or a defendant. This stay may be entered in proceedings occurring up to sixty days after a service member leaves service, and it may last for up to three months following termination of service.[48] While section 521 does not expressly limit its application to civil proceedings, section 510 indicates the purpose of the SSCRA is to provide protection with respect to "civil liabilities."[49] Accordingly, courts have not applied the SSCRA to stay criminal proceedings.[50]

Other provisions of the SSCRA, such as those providing protection against mortgage foreclosure and installment contract termination, permit a court to enter a stay. These other provisions stay enforcement of an underlying obligation, such as the obligation to make payments on a mortgage. Section 521, however, is much broader. Rather than staying an obligation, section 521 authorizes the stay of litigation arising from such an obligation. As such, it is not limited to any one situation, but has broad application, making it very useful.

As a general rule, courts have applied section 521 liberally and have used it to benefit service members who could not participate in proceedings because of their service.[51] If a court finds that adverse material effect is present, it will stay a proceeding. Consequently, mustering facts supporting or rebutting the presence of material effect is essential. The Supreme Court determined early on that the burden of proving material effect—which is not allocated in section 521—will depend on the relative circumstances of the parties.[52] Service members who are not overseas and who are assigned to nearby installations can expect to be assigned the burden of proving material effect.

The most common pitfall associated with section 521 deals with personal jurisdiction over an absent service member. Because of the

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[48] *Id.* § 521.

[49] *Id.* § 510.

[50] *See, e.g.*, Dotseth v. Arizona, 5 Ariz. App. 424, 427 P.2d 558 (Ariz. Ct. App. 1967) (court determined that SSCRA was inapplicable to stay criminal proceedings for burglary).

[51] *See, e.g.*, Kramer v. Kramer, 668 S.W.2d 457 (Tex. Ct. App. 1984) (defendant's letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that otherwise was lacking; proceeding should have been stayed).

[52] Boone v. Lightner, 319 U.S. 561 (1943) (service member stationed in area in which litigation occurred had burden of establishing military service impaired his ability to appear).

transitory nature of military service, service members occasionally are sued in courts in jurisdictions in which they never have lived or traveled. The majority of courts recognize that a letter or motion by an absent service member requesting a stay pursuant to the SSCRA is insufficient to provide personal jurisdiction that a proceeding otherwise lacks.[53] Some courts, however, have taken a more draconian approach and concluded that such a communication, even if limited to the purpose of requesting a stay, provides personal jurisdiction over an absent service member.[54]

Compounding the problem is the subsequent inability of the service member to reopen the resultant default judgment. The SSCRA provides that a service member with a meritorious defense may reopen a default judgment when service materially affected the ability to appear.[55] To obtain this protection, however, there must have been a default of "any appearance" in the original proceeding.[56] The same courts that find a letter or a motion confers personal jurisdiction have found that such a letter or motion also is "an appearance," thereby forfeiting the right to reopen the judgment.[57]

The House of Representatives passed legislation in 1990 that would prevent a court from obtaining personal jurisdiction based on a letter, affidavit, or motion.[58] The Senate, however, did not act on a similar amendment. Subsequently, in February 1991, Congress passed a variation of this proposed amendment as part of the SSCRA Amendments of 1991.[59] Unlike section 521, the new provision does not require a showing of material effect. Instead, if the applicant, or someone acting on the applicant's behalf, is on active duty, and is serving outside the state in which the action is located, the action will be stayed at any stage before final judgment.[60] Congress, however,

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[53] *See, e.g.*, ***Kramer,*** 668 S.W.2d at **457;** Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (sailor was entitled to stay of custody proceedings when service aboard ship precluded his participation in the proceedings).

[54] ***See,*** *e.g.*, Skates v. Stockton. 683 P.2d 304 (Ariz. Ct. App. 1984) (even though court did not otherwise have personal jurisdiction, it determined that legal assistance constituted an appearance sufficient to give it personal jurisdiction).

[55] 50 U.S.C. app. § 520.

[56] *Id.*

[57] *See Skates,* 638 P.2d at 304; ***see also*** Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment).

[58] H.R. 5814, 1Olst Cong., 2d Sess. § 2, ___ Cong. Rec. ___ (1990) [hereinafter H.R. 5814]. The proposed amendment provided that an application for a stay pursuant to section 521 would not constitute an appearance for any purpose.

[59] SSCRA Amendments of 1991, § 6.

[60] *Id.*

limited the duration of this amendment. Any stay entered would remain effective until after June 30, 1991, presumably in anticipation of the end of hostilities during Operation Desert Storm.[61] Congress clearly intended this amendment to help service members involved in Operations Desert Shield and Desert Storm. It does not, however, remedy the ongoing problem of inadvertently providing personal jurisdiction when requesting a stay.

V. TERMINATING LEASES OF PREMISES

If a service member entered a lease of premises for dwelling or business purposes before beginning active duty or receiving orders to active duty, section **534** provides a means by which the service member may lawfully terminate the lease.[62] Unlike many other provisions of the SSCRA, to invoke this protection, the service member need not show that military service is materially affecting the ability to meet obligations under the lease, particularly rent payments. Instead, the service member need only show that the lease was entered into by the service member prior to military service (which the SSCEA defines as *active* service), that the lease was to be used for dwelling, professional, business, agricultural, or similar purposes by the service member or the service member's dependents, and that the service member is currently in military service.

Unfortunately, many service members and their commanders tend to misconstrue this provision. They believe it allows service members who entered leases ***after*** entry onto active duty to terminate their leases, particularly during emergency deployments such as Operations Desert Shield and Desert Storm. The SSCRA provides no such protection. Several states[63] have statutes that allow termination of leases under these circumstances, but these laws are rare and do not represent the majority of the states.[64]

The SSCRA does protect people such as Reserve component service members who entered their leases before they were called to

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[61] *Id.*

[62] *Id.*

[63] *See, e.g.*, Del. Code Ann. tit. 25, § 5509 (1989); Ga. Code Ann. § 44-7-37 (1982 & Supp. 1990); Idaho Code § 55-2010 (1988); N.C. Gen. Stat. § 42-45 (1984 & Supp. 1990); Va. Code Ann. § 55- 248.21:1 (1986).

[64] As a practical matter, a reminder to local landlords that deploying units eventually will return may be helpful. If tenants who are deploying cannot terminate their leases because of landlord obstinacy, the landlords should be informed that the housing office will note their refusal to cooperate. Future military patronage could be uncertain.

active duty. Upon furnishing written notice and proof of active duty (such as orders) to their landlords, they may terminate their leases. The SSCRA provides specific guidelines for calculating when the termination becomes effective.[65] Ordinarily, leases will terminate at the end of the month following the month in which the service member gives notice of intent to vacate.[66]

VI. PROTECTION FROM EVICTION FROM LEASED DWELLINGS

The SSCRA provides protection from eviction for service members and family members regardless of whether the service member entered into a lease before or after entry upon active duty.[67] If the service member or the service member's dependents are occupying leased premises used for dwelling purposes, the service member's military service materially is affecting his or her ability to make rental payments, and the rent does not exceed $1200[68] per month, the SSCRA provides for a stay of eviction for up to three months. The SSCRA Amendments of 1991 set the rent cap at $1200, up from $150, where it had been since 1966. This new limit applies to actions for eviction or distress commenced after July 31, 1991.[69]

Obviously, for attorneys involved in actions begun before July 31, 1991, the $150 dollar cap on rent makes it difficult to successfully invoke this provision. At least one court has been receptive to a request that it adjust for inflation in considering the amount of the rent. In *Balconi v. Dvascas*[70] the monthly rent was $340. The court concluded, however, that the rent was actually less than $150 in 1966 dollars, after adjustment for inflation occurring since 1966. Accordingly, the court stayed an eviction proceeding. Because Congress has not yet based the cap on an inflation-adjusted standard, this inflation-adjusted approach may have continued usefulness [71]

The *Balconi* case also is significant because it illustrates the independent ability of dependents to assert protection from eviction

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[65]*See* 50 U.S.C. app. § 534(2).

[66]*Id.*

[67]*Id.* § 530.

[68]The SSCRA Amendments of 1991, § 2, raised the limit from $150 to $1200.

[69]*Id.*

[70]133 Misc. 2d 686, 507 N.Y.S.2d 788 (N.Y. Civ. Ct. 1986).

[71]*See, e.g.*, Cornell Leasing Corp. v. Hemmingway, 197 Misc. 2d 83, 553 N.Y.S.2d 285 (N.Y. Civ. Ct. 1990) (eviction granted but court noted that the $150 amount was not a *sine qua non* for application of section 530).

in accordance with section 536. The tenant in *Balconi* was the ex-wife of a service member who was not a party to the lease. She lived with their minor child, who was a dependent of the service member. The court held that because they were both dependent on the service member for financial support, they were both dependents for purposes of this provision.

VII. TERMINATING AUTOMOBILE LEASES

Like other consumers, Reserve and active component service members often enter automobile leases. With the Desert Storm deployments, continued payments on these leases were difficult or unnecessary for service members who left their cars behind. Although their applicability to automobile leases has not been established firmly through litigation, several provisions of the SSCRA should provide relief to some Reserve component service members faced with continued automobile lease payments.[72]

Section 531 affords protection from rescission or termination of installment contracts and "leases. . .with a view to purchase."[73] If a service member has made a deposit or a payment on an installment contract or a lease with a view to purchase real or personal property, only a court may approve contract termination and repossession of the property. As with many provisions of the SSCRA, the service member seeking the protection must have entered into the underlying obligation ***before*** beginning active service. Further, the service member must have made a deposit or a payment on the obligation before active service.

If the service member meets these criteria, the seller or lessor may not terminate the contract and repossess the property unless a court determines that military service is not materially affecting the service member's ability to comply with the obligation. Knowing repossession or attempts to repossess property subject to this provision without judicial approval is a misdemeanor under the SSCRA and punishable by imprisonment of up to one year.[74]

The central issue for a service member sued for nonpayment of an automobile lease is whether or not the client entered the lease

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[72]50 U.S.C. app. § 531 (installment contracts for purchase of property); *id.* § 532 (mortgages of real and personal property).
[73]*Id.* § 531.
[74]*Id.*

with a view to purchase the automobile.[75] An option to purchase at the conclusion of the lease may meet this requirement, particularly if any part of the lease payments is credited toward the purchase price. The purpose of the SSCRA, as described earlier, also is important in analyzing the availability of relief. The dominant theme of the SSCRA—that service members should not suffer hardship by virtue of military service—applies to car lease situations. Forcing continued payments for an unnecessary and inaccessible car, or requiring penalty payments for early lease termination, creates hardships for deployed service members.

Additionally, reference to the Truth in Lending Act[76] (TILA) and the Consumer Leasing Act[77] (CLA) may be useful. If an automobile lease falls under the provisions of the CLA, it is likely to be a true leasing agreement. On the other hand, if the terms of a lease indicate it is actually a disguised financing arrangement, then the disclosures required by the TILA should be present.[78] An automobile financing arrangement disguised as a car lease lends credence to the argument that such a lease is truly a "lease with a view to purchase."

If a court determines the SSCRA to be applicable to an automobile lease, it has several alternatives. Many service members probably would prefer to terminate such a lease, because their cars may be of little value to them. The court may order refund of installment payments and any deposit as a condition of repossession.[79] If a service member desires to retain the automobile and requests a stay of proceedings, the court may grant a stay. A stay of court proceedings under the SSCRA may last up to three months following termination of active service.[80]

The SSCRA provides an alternative provision if a service member wishes to initiate action seeking relief, instead of waiting for a

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[75]On the other hand. if a Reserve component service member is buying a car on an installment contract basis, and military service is affecting materially the ability to pay, this provision should have direct applicability.

[76]15 U.S.C. §§ 1602-1667 (1988).

[77]*Id.* § 1667. The Consumer Leasing Act is actually part of the Truth in Lending Act.

[78]*See* 12 C.F.R. § 226 (1990) (commonly known as "Regulation Z," this regulation contains required disclosures for consumer credit transactions).

[79]50 U.S.C. app. § 533 allows a court that has stayed an action for rescission or contract termination to appoint three disinterested parties to appraise the property involved. The court then may order the service member's equity to be paid to him or her or a representative as a condition of rescission or contract termination.

[80]A stay under this circumstance would likely be pursuant to two provisions of the SSCRA. 50 U.S.C. app. § 521 allows service members to stay any action in any court during the period of service or within 60 days thereafter. 50 U.S.C. app. § 624 authorizes such a stay for a period of up to three months following termination of active service.

creditor to take action for nonpayment. Under section 590, if the service member enters the automobile lease before active duty and subsequently experiences difficulty making payments because of military service, he or she may apply for a stay of the obligation.[81] In this event, the court may stay enforcement of the obligation to make lease payments during the service member's military service. Additionally, the court may continue to stay contract rescission or repossession after termination of service for a period of time equal to the time in active service. If the court extends this stay after active service ends, the discharged service member typically must pay all backpayments during this grace period. At the same time the discharged service member is making these payments in arrears, he or she may be required to begin making regular payments on the lease as well. The better approach, however, is simply to extend the maturity date on the lease by a period equal to the time spent on active duty.

VIII. PROTECTION FROM MORTGAGE FORECLOSURE

Unlike automobile leases, protection in the SSCRA against foreclosures is well established.[82] Although similar to the protection against termination of installment contracts, the protection in section 532 against foreclosure requires that the underlying financial obligation be secured by real or personal property.[83] For Reserve component service members who entered security agreements on personal property such as their automobiles, or who entered mortgages for the purchase of real property, this provision may afford much needed relief. If a service member or a dependent owned the property in question before beginning active service, entered a mortgage or security agreement before entry on active duty, and if military service is materially affecting the ability to pay, relief is available under the SSCRA.

As an article III protection, section 532 does not require that a service member be a party to the underlying obligation. In *Tucson Telco*

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[81] 50 U.S.C. app. § 590(1)(b).

[82] *See* Federal Nat'l. Mortage Ass'n v. Deziel, 136 F. Supp. 859 (D. Mich. 1956) (loss of approximately $100 family income per month pursuant to husband's entry in military service was sufficient adverse effect to stay foreclosure for one year); Meyers v. Schmidt, 181 Misc. 589, 46 N.Y.S.2d 420 (N.Y. Civ. Ct. 1943) (mortgage foreclosure action stayed on basis that any doubt about application of the SSCRA should be resolved in favor of service member).

[83] 50 U.S.C. app. § 532.

Federal Credit Union v. Bowser[84] the court upheld an award of damages for wrongful repossession of an automobile owned by a civilian woman. Approximately seven months before her marriage, she entered a chattel mortgage to purchase her car. Approximately one year after her marriage, her husband was inducted into the military. When the creditor repossessed her car, she successfully invoked section *532* for wrongful foreclosure. The fact that her husband was not a party to the mortgage was immaterial. As discussed above, protection against mortgage foreclosure is a provision that has application independent of whether a service member is a party to the underlying obligation.[85]

Relief may consist of a stay of the foreclosure proceedings or a decrease in payments during the period of service.[86] Other relief may include reopening a default foreclosure judgment[87] or obtaining an extension of the redemption period by an amount of time equal to the active military service.[88] For some persons entering military service during Operations Desert Shield and Desert Storm, this provision was of critical necessity. Although the six-percent limitation on interest was available,[89] it could not provide sufficient relief unless used in combination with section *532*. Physicians, in particular, who incurred reductions in income from hundreds of thousands of dollars to fractions of those amounts, benefitted from a combination of SSCRA provisions. After application of the six-percent limit on mortgages, some found it necessary to apply to extend mortgage maturity dates by a period equal to their time on active duty.[90] This equitable relief was an available and critical remedy under section 532.

IX. THE SIX-PERCENT LIMIT ON INTEREST RATES

One of the most helpful provisions of the SSCRA is the maximum rate of interest provision found in section 526.[91] This provides a six-

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[84]451 P.2d *322* (Ariz. Ct. App. 1969).
[85]*See supra* text accompanying notes 38-46.
[86]50 U.S.C. app. § 532(2).
[87]*Id.* § 520.
[88]*Id.* § 525.
[89]*Id.* § 526 (discussed *infra* text accompanying notes 91-117).
[90]Consider the case of a cardiologist called to active duty who had an income of $500,000 per year and a monthly mortgage payment of $7500. Assume a contracted interest rate of 12% on a recent mortgage. Application of the six-percent cap still leaves the monthly mortgage payment at $3750, well beyond the limit of almost every military salary.
[91]50 U.S.C. app. § 526.

percent cap on the interest that a lender may charge a service member for credit extended to the service member ***before*** the service member's entry on active duty. During a peacetime, service members rarely invoke this provision. The primary reason for its seldom use are the requirements that the service member's military service materially affect the ability to pay the obligation and that the obligation predate the active service. Most active component officers and enlisted service members entering the military from civilian life actually experience an enhanced ability to meet any preservice financial obligations.

The Reserve component call up during Operations Desert Shield and Desert Storm changed this scenario drastically. Many Reserve component service members experienced financial difficulties because their military pay and benefits did not match their civilian pay. The affected service members entered nearly all of these financial commitments before they began active service.

Most creditors likely will assert that they will abide by the SSCRA and limit interest rates to six percent for those service members meeting the criteria set out above. Actually, this provision of the SSCRA puts the burden on the creditor to demonstrate that a service member's military service is *not* affecting the ability to repay a loan. Attorneys should take the initiative, however, and advise clients' creditors if financial obligations cannot be met. This is a better course than allowing a client to go into default and then invoking the SSCRA after the fact, as a defense.

A. INTEREST ABOVE SIX PERCENT

Perhaps the most important question concerning the six-percent limitation is what happens to the interest in excess of six percent? Legislative history indicates that Congress intended for excess interest to be forgiven.[92] The six-percent cap was not part of the original SSCRA, which Congress enacted in 1940. Instead, it was one of several 1942 amendments. In referring to the original law, a 1942 Senate Report noted that it did not "prevent an accumulation of excess interest" and only allowed for a stay of proceeding in the event collection action was initiated.[93] The report indicated that the 1942

[92]This conclusion receives further support from independent research and analysis by the Congressional Research Service. ***See*** Congressional Research Service Memorandum, ***The Interest Rate*** *Cap of* ***the Soldiers'*** *and* ***Sailors'*** *Civil Relief* ***Act*** *of 1940, as Amended* **(Aug.** 27, 1990).

[93]S. Rep. No. **1558,** 77th Cong., 2d Sess. 4 (1942).

amendment would, however, prohibit interest at a rate in excess of six percent.[94] During debate in the House of Representatives, a member of the House Committee on Military Affairs, explained this provision. He stated that "while a man is in service the interest on his contract shall not exceed 6 percent per annum."[95] He pointed out that some state laws allowed interest charges of up to three-and-a-half percent per month and that this provision would prevent such practices.[96]

Responding to a multitude of inquiries generated by reserve call ups during Operation Desert Shield, the House and Senate Veterans' Affairs Committees held a joint hearing on the SSCRA on September **12,** 1990. In prepared testimony submitted to the committees, members of the mortgage banking industry acknowledged that interest above six percent should be forgiven if a service member otherwise qualified for that protection. Representatives of the Mortgage Bankers Association of America,[97] the Federal National Mortgage Association (Fannie Mae),[98] the Federal Home Loan Mortgage Corporation (Freddie Mac),[99] and the Government National Mortgage Association (Ginnie Mae)[100] all agreed that mortgages issued by lenders backed by their organizations would not accrue interest above six percent during active service of qualifying individuals. As a general rule, these organizations require that mortgage issuers obtain a copy of a Reserve component service member's orders to active duty before granting the reduction in interest. Fannie Mae has taken a more lenient policy than required by the SSCRA. It will not require the mortgage issuer or servicer to determine whether entry on active duty materially affects a service member's ability to pay interest at the contractually agreed upon rate. Upon receipt of orders, Fannie Mae automatically will reduce interest payments to six percent. Fannie

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[94] *Id.*

[95] 88 Cong. Rec. 5366 (1942).

[96] *Id*

[97] *The* ***Soldiers'*** *and* ***Sailors' Civil Relief Act: Joint Hearing before the*** *House and* ***Senate Veterans' Affairs Committees,*** lOlst Cong., 2d Sess. (1990) (statement of Lyle E. Gramley, Senior Staff Vice President and Chief Economist, Mortgage Bankers Association). The Mortgage Bankers Association deals exclusively with real estate loans. It represents mortgage banking companies, commercial banks, mutual savings banks, savings and loan associations mortgage insurance companies, life insurance companies. mortgage brokers, title companies, state housing agencies, investment bankers, and real estate investment trusts.

[98] *Id.* (statement of Robert J. Engelstad, Senior Vice President, Federal National Mortgage Association).

[99] *Id.* (statement of Judith A. Kennedy, Vice President, Government Affairs. Federal Home Loan Mortgage Corporation).

[100] *Id.* (statement of Arthur J. Hill, President, Government National Mortgage Association).

Mae and Freddie Mac will absorb the losses resulting from the reduced interest rate.[101]

If a loan is not held in a Fannie Mae or Freddie Mac mortgage pool, the individual commercial bank or lender issuing the loan likely will absorb the loss. The testimony before Congress indicated that up to two-thirds of all mortgages are not in mortgage pools.[102] Service members may have difficulty in dealing with mortgage issuers as well as other lenders under these circumstances.

For third parties to receive the benefits of the six-percent cap, a person in military service must be a party to the underlying credit obligation. Section 526 is not part of article III of the SSCRA and does not protect dependents in obligations to which a service member is not a party.[103] On the other hand, sureties, guarantors, and others (such as dependents) who cosign obligations with service members may invoke SSCRA protections such as section 526.[104]

B. ATTEMPTS TO CIRCUMVENT THE SIX-PERCENT LIMITATION

Mortgage companies and other creditors who choose not to comply fully with the SSCRA have done so in various ways, some of which are subtle, but effective.[105] Two well-known finance companies, one specializing in personal loans and the other in automobile purchase loans, interpreted the SSCRA as forgiving interest above six percent. The companies initially insisted, however, on increasing payments on principal to the point that total monthly payments under their revised plans were equal to payments before application of the SSCRA protection. Although this may result in early repayment of the loan, it provided no current relief from payments that were unmanageable on a military salary. This approach defeats the congres-

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[101]Ginnie Mae, unlike Fannie Mae and Freddie Mac, does not consider itself to be the owner of record of the securities it guarantees. It has indicated it will not pay the difference between the agreed rate and six percent to those holding Ginnie Mae securities. The servicing bank is expected make up the difference. *Id.* (statement of Arthur J. Hill, President, Government National Mortgage Association).

[102]*Id.* (statement of Lyle E. Gramley, Senior Staff Vice President and Chief Economist, Mortgage Bankers Association).

[103]*See* 50 U.S.C. app. § 536.

[104]*Id.* § 513.

[105]Information concerning creditor ploys and proposed responses was provided by Lieutenant Commander Laura M. Horton, USNR, Office of the Staff Judge Advocate, National Naval Medical Center, Bethesda, Maryland.

sional purpose behind enactment of this provision and is a violation of the SSCRA.[106]

Another approach some finance companies took was to agree to reduce the interest charges to six percent by refinancing the loan at a six-percent rate. The companies then charged the service member new finance charges associated with loan initiation. A variation of this was refinancing at the six-percent rate, but requiring payments based on the number of years remaining on the mortgage, rather than on the number of years agreed upon in the original financing arrangement. This approach resulted in higher payments at the six-percent rate than a service member would pay if the new mortgage were based on the original term of years.

In both scenarios, service members stand to lose some, if not all, of the benefits of the six-percent limitation. They would pay more than the appropriate amounts, based on the additional charges or higher monthly payments. Further, they could lose entirely the protection of the six-percent interest cap. Unscrupulous creditors may argue that this provision becomes inapplicable upon refinancing. This srgument would be based on the fact the new loan agreement for refinancing was signed *after* entry on active duty. The six-percent protection applies only to pre-active duty financing.

The response to these tactics should be two-fold. First, in the language of section 526, Congress included as interest subject to the six-percent cap charges such as "service charges, renewal fees, fees or any other charges (except bona fide insurance) in respect of [the loan]."[107] This language is sufficiently broad and prohibitory to preclude so-called "refinancing" fees and charges. Second, congressional debate prior to enactment of the provision anticipated attempts to affect the underlying obligations in these situations. One member of Congress noted that the intent of this provision was to avoid affecting the "substance of the contract," and to address only a contract's enforcement.[108] Obviously, the finance companies' attempt to refinance a loan would affect the substance of the contract and con-

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[106]One Desert Shield-Storm case involving the six-percent cap never went to trial. In United States *ex rel.* Bennett v. American Home Mortgage, a mortgage company in New Jersey agreed to reduce interest payments on an activated National Guard sergeant's mortgage to six percent, but required continued payments at the preactive service total. When the United States Attorney presented the legislative history of section ***526,*** the mortgage company entered a consent agreement detailing rompliance consistent with the discussion in this article.

[107]50 U.S.C. app. § 526.

[108]88 Cong. Rec. 5366 (1942).

travene congressional intent. Accordingly, service members should refuse to apply for refinancing and should insist that interest charges be reduced to six percent, with no provision for accrual. The burden of persuasion rests with the creditor, who, under the SSCRA, must convince a court otherwise.

Some creditors refused to reduce interest to six percent until a service member submitted proof of premobilization income compared to current military income. Section 526 puts the burden on the creditor to establish that military service is *not* affecting the ability to repay a loan or a mortgage. As a practical matter, however, service members can best take advantage of the SSCRA by putting creditors on notice of their desire to benefit from this provision. Service members should consider providing copies of orders to active duty and outlining differences between civilian and military pay.

Other creditors were more aggressive in their demands for proof of material effect. Some required current lists of debts and assets as well as completion of new loan applications. These requirements are contrary to the SSCRA. As discussed previously, invocation of section 526 is not intended to affect the underlying contract. Submission of information regarding debts, assets, and new loan applications indicates a creditor's intent to reappraise the creditworthiness of a customer. This evaluation should have been completed at the time of the initial loan application. The SSCRA places the burden on the creditor to establish no material effect from active service. Submission of proof of a significant reduction in salary while on active duty should be sufficient, and, as noted, is more than the SSCRA actually requires of a service member.[109]

For loans that do not qualify for the six-percent cap on interest, such as those in which nonmilitary spouses were obligated separately, as well as loans that do not qualify for military deferments, negotiation remains the key. Lenders may agree to reduced or deferred payments when informed that an individual who either directly or indirectly was making payments has been ordered to active duty.

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[109] As a practical matter, these disputes are good candidates for the installation Armed Forces Disciplinary Control Board. If the board determines that a financial organization is acting contrary to law, it may recommend that the installation commander place the organization off-limits to military personnel. In smaller communities in which the military has a significant presence, resorting to this procedure should encourage more willing compliance with the SSCRA. *See* Army Reg. **190-24,** Military Police: Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services (Nov. **15,** 1982).

C. CREDIT CARDS

Even for those creditors who correctly apply section 526, technical compliance is sometimes difficult. Credit card issuers particularly are challenged in their efforts to accord the benefits of the six-percent interest limitation to service members. The following example illustrates the difficulties involved with open-end financing through credit cards.

Assume a Reserve component service member has a common credit card, such as a MasterCard or a Visa card, and has agreed to pay **14.9%** interest on any balance not paid within one month of billing. If the service member has a balance owed of $500 prior to active duty, the service member may invoke section 526 when military service affects his or her ability to pay. In this event, the card issuer must reduce interest charges on the $500 to six percent. Any additional charges after entry on active duty, however, will be subject to the original 14.9% interest rate. Section 526 applies only to preservice financial obligations. The card issuer now must determine a method by which to track two interest rates for one charge card. Given computerized banking technology, this proved unfeasible during Desert Shield and Desert Storm. Instead, banks that complied with the SSCRA issued second cards to service members, with which post-active duty charges were to be made. While this appears to be a reasonable solution, it generated confusion among service members, particularly when the banks did not explain their procedure. Additional problems arose when the banks concurrently did not extend an offer of a new credit card.

D. GUARANTEED STUDENT LOANS

Many Reserve component service members called to active duty during Operations Desert Shield and Desert Storm had student loan debts. While several provisions of the Soldiers' and Sailors' Civil Relief Act (SSCRA) provided relief from financial obligations such as these, a recent Department of Education (DOE) memorandum[110] affects application of section 526. The DOE memorandum states that this limitation on interest rates is ineffective with respect to guaranteed student loan (GSL) obligations. According to DOE, section 1078(d),

[110] Department of Education Memorandum, *GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations* **(Aug. 29,** 1990); *see also* Office of The Judge Advocate General Memorandum, *Operation DESERT SHIELD Legal Assistance Issues II* (Oct. 12, 1990).

title 20, United States Code,"' affects the scope of the SSCRA protection. Section 1078(d) states that no provision of any federal or state law that limits the interest rate on a loan will apply to the GSL program. DOE's position is that this renders ineffective the six-percent interest cap if the loan in question is a GSL. All other types of loans and credit arrangements, however, remain unaffected by section 1078(d). Accordingly, other provisions of the SSCRA, including those providing for a stay of proceedings[112] and reopening default judgments,[113] remain available to GSL debtors.

While the six-percent protection is not available for holders of GSLs, the DOE will permit lenders to forbear or to defer GSL payments. A service member may apply to a lender for an emergency forbearance.[114] "'Forbearance' means permitting the temporary cessation of payments, allowing an extension of time for making payments, or accepting smaller payments than were previously scheduled."[115] According to the DOE memorandum, a lender may grant an emergency forbearance for up to six months based on a phone call or written request from the borrower or a close family member. The borrower and lender must enter a written agreement for an extension of forbearance beyond six months.

Borrowers serving on active duty, including Reserve component personnel on active duty, probably would be served better by applying for a military deferment of their GSLs. Under DOE regulations, borrowers serving for up to three years on active duty in the armed forces or the Commissioned Corps of the Public Health Service may receive a military deferment.[116] In most cases, a deferment means a borrower will have periodic installment payments of principal deferred during active service of up to three years. If a service member entered a GSL agreement before October 1, 1981, he or she also may apply for a six-month grace period of deferment that begins after the completion of the deferment period for military service. Interest, however, usually will accrue and must be paid by the borrower during the deferment period and during any postdeferment grace period.

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[111] Congress passed this provision as section 428(d) of the Higher Education Act of 1965.

[112] 50 U.S.C. app. § 521.

[113] *Id.* § 520.

[114] *See* 34 C.F.R. § 682.211 (1990). The Secretary of Education encourages lenders to grant forbearance in order to prevent borrowers from defaulting.

[115] *Id.* § 682.211(a)(1).

[116] *Id.* § 682.210(b)(3).

Service members often are unaware of the availability of military deferments and sometimes do not submit requests concurrent with orders to active duty. Department of Education regulations anticipate late requests and authorize a retroactive application of the deferment period for up to six months after the lender receives the deferment request.[117] The request for deferment should include documentation sufficient to establish eligibility for deferment. In most cases, a copy of orders calling a service member to active duty should be sufficient.

X. PROTECTION AGAINST ADVERSE ACTION BASED ON EXERCISE OF RIGHTS UNDER THE SSCRA

As part of the Soldiers' and Sailors' Civil Relief Act Amendments of 1991,[118] Congress amended section 508 to prohibit retaliatory action against those who invoke the SSCRA. Under this amendment, an application under the provisions of the SSCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium. or other *civil obligation or liability* cannot be the basis for certain actions.[119] Specifically, lenders cannot then determine that the service member is unable to pay an obligation or liability. Additionally, with respect to a credit transaction between service members and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies or, if an insurer, refuse to insure a service member. This amendment has added significance with respect to the six-percent cap on interest rates. Invocation of the six-percent cap could otherwise provide a very real incentive for a lender to then take adverse action on a service member's credit.

XI. ALIMONY AND CHILD SUPPORT OWED BY RESERVE COMPONENT SERVICE MEMBERS CALLED TO ACTIVE DUTY

As Reserve component service members were called to active duty during Operations Desert Shield and Desert Storm, family sup-

[117] *Id.* § 682.210(a)(5)(iii).
[118] SSCRA Amendments of 1991, § 7
[119] *Id.* (emphasis added).

port problems soon began to surface. Service members owing alimony and child support often found their ability to meet these obligations impaired by military service. In particular, Reserve component service members who are paid less on active duty than in their civilian occupations sought relief from support requirements. Although not explicitly provided in the SSCRA, several arguments for relief under the SSCRA are available.

As discussed above, the SSCRA reflects congressional efforts to avoid or remedy the adverse effects of military service, but it does not explicitly address all such problems. Even when the SSCRA does not have a specific provision providing relief from a particular obligation, several aspects of the SSCRA may help. Any case in which military service materially affects a service member's ability to meet financial or legal obligations may be open to corrective action under the SSCRA.

Obviously, if a service member has an alimony or child support obligation that predates active service, any drop in income as a result of activation will affect adversely the service member's ability to comply with the support obligation. Although this approach has met with mixed success historically,[120] attorneys should be prepared to assert that section 510 has direct applicability to that situation. The obligation to pay support in an amount beyond what is reasonable, given current military pay, should be suspended during active service.

Section 521[121] of the SSCRA lends support to this approach. This provision provides that a court must stay an action or proceeding at any stage when a service member is a plaintiff or defendant unless military service does not materially affect the ability to prosecute or defend an action.[122] Given recent changes in child support laws, timely invocation of the SSCRA in support matters is critical. Federal law now requires that each state have a procedure that makes any payment of child support, pursuant to a court order, a judgment on and after the date the payment is due.[123] Under this provision, if a service member is in arrears in child support, a deficiency judgment automatically becomes effective by operation of law. It has "the full

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[120] *See* Jaworski v. McCloskey, 47 N.Y.S.2d 26 (N.Y. Sup. Ct. 1944) (in view of the SSCRA, sheriff could not be required to arrest a Navy officer for willful failure to pay alimony). ***Contra*** Kerrin **v.** Kerrin, 97 Cal. App. 2d 913, 218 P.2d 1004 (Cal. Ct. App. 1950) (service member was required to pay the difference between preservice support decree of $150 and in-service support allotment of $67).

[121] 50 U.S.C. app. § 521 (discussed *supra* text accompanying notes 47-61).

[122] *Id.*

[123] Pub. L. No. 99-509, § 9103(a), 100 Stat. 1973 (1986) (codified at 42 U.S.C. § 666(a)(9)).

force, effect, and attributes of a judgment of the [s]tate'' concerned, including enforceability.[124] Additionally, retroactive modification is extremely curtailed. The law allows retroactive modification only for those periods during which a petition for modification is pending.[125]

As a consequence of the child support requirements, attorneys should file petitions for modification of support orders as expeditiously as possible. Although retroactive effect may be possible for a modification of alimony, retroactivity of child support modifications will require quick actions on the part of the service member's attorney. Legal assistance attorneys should consider a stay of enforcement action pursuant to the SSCRA as a means of intermediate relief. In support of the argument that a change in circumstances compels a modification, attorneys should be prepared to discuss the policy reasons behind the SSCRA. Specifically, the admonition in section 510 that military service should not affect adversely the rights of those in the military service can be persuasive. A significant cut in pay, combined with a continuing requirement to pay support in preservice amounts, will have such an adverse effect on a service member.

XII. POWERS OF ATTORNEY

During the closing stages of the Vietnam War, Congress enacted section 591, which authorizes an extension of some powers of attorney that were executed by service members who subsequently were missing in action.[126] The SSCRA Amendments of 1991 reinstate this protection.[127] Section 591 provides an automatic extension of a power of attorney for the period a service member is missing if it was executed by a person in the military service who is now in a missing status;[128] designates a spouse, parent, or other named relative to be the attorney in fact; and expires by its own terms after the person entered a missing status.[129] The 1991 amendment extends this protection to a power of attorney that *expires* by its own terms after July 31, 1990.[130] If a power of attorney is executed after the effective date of the 1991 amendment, and "by its terms clearly indicates

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[124] 42 U.S.C. § 666(a)(9)(A) (1988).
[125] *Id.* § 666(a)(9)(C).
[126] Pub. L. No. 92-540, tit. V, § 504(2), 86 Stat. 1098 (1972) (codified as amended at 50 U.S.C. app. § 591).
[127] SSCRA Amendments of 1991, § 3.
[128] The term "missing" is defined in 37 U.S.C. § 551(2).
[129] 50 U.S.C. app. § 591.
[130] SSCRA Amendments of 1991, § 3.

that the power granted expires on the date specified,''[131] then this provision probably will not act to extend the power of attorney if the service member is then declared missing. This indicates congressional intent to protect those who, when they executed powers of attorney, may not have known that they were facing imminent hostilities. Those executing powers of attorney after the effective date of the 1991 amendment presumably knew of this danger and took into account the possibility they might later be declared missing in action.

XIII. PROTECTION FOR HEALTH CARE PROVIDERS AND OTHER PROFESSIONALS

The SSCRA Amendments of 1991 include a new provision designed to protect health care providers and other professionals called to active service.[132] This new provision is intended to ensure that professionals who have suspended their civilian practice during military service will not suffer from financial inability to maintain insurance coverage for preservice practice. Many carriers require ongoing premium payments, even after practice has ended, to maintain coverage against claims that subsequently might be filed. In some instances, it is possible that military salaries of health care providers will be less than their annual malpractice premiums.

Under the new provision, health care providers, and others furnishing "services determined by the Secretary of Defense to be professional services,''[133] may be eligible for protection. To qualify, they must have been ordered to active duty after July 31, 1991, and have had professional liability insurance in effect before beginning active duty. If so, they will be allowed to apply to have their insurance policies suspended during active service. Insurance carriers may not charge premiums during active service, and providers will receive refunds of any premiums paid for future coverage or credit toward payment of premiums after active service ends. After active service, health care providers have thirty days to request reinstatement of insurance. This provision provides a stay of civil actions against the provider while insurance coverage is suspended if the action is commenced during the period of suspension, the action is based on an

[131] 50 U.S.C. app. § 591.
[132] SSCRA Amendments of 1991, § 4.
[133] *Id*. This provision is sufficiently broad to provide protection for attorneys called into active duty, if the Secretary of Defense should so choose.

incident occurring before the date the suspension became effective, and the insurance otherwise would cover the alleged malpractice. If an action is stayed, it would be deemed filed on the date the insurance is reinstated. Further, the statute of limitations would not run during periods of suspended insurance coverage.

XIV. CONCLUSION

The fundamental purpose of the SSCRA is to ensure that service members are not disadvantaged either legally or financially when serving their country. Operations Desert Shield and Desert Storm provided a real-world lesson on the purpose and applicability of the SSCRA. While many of its provisions are inapplicable to peacetime active duty service members, these same provisions can provide much needed relief for Reserve component service members who are ordered to leave their civilian occupations and salaries for active duty. Timely and informed use of the provisions of the SSCRA will help ensure that individuals who serve their country will not be impaired financially or legally as a result of that service.

OPERATIONS DESERT SHIELD AND DESERT STORM: RESURRECTION OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

by Lieutenant Colonel Gregory M. Huckabee*

I. INTRODUCTION

On August 2, 1990, Iraq's president, Saddam Hussein, marched his battle-hardened forces into neighboring Kuwait in quest of oil fields and the liquidation of a multibillion dollar debt? While border disputes are not uncommon in the Arab world, invasion en masse and total conquest of an independent state previously was unheard of in the Middle East, where stalemate is the accepted norm. War clouds had circled the area for several months, but few believed Hussein would dare strike and attempt to subjugate a region containing one-fifth of the world's oil supply.[2]

Faced with a threat that could paralyze an already recession-prone national economy, the Bush Administration took immediate action to protect both United States and international interests. A successful Iraqi invasion of Saudi Arabia could result in Saddam Hussein's controlling fifty-four percent of the world's oil reserves.[3] In the first United States Armed Forces deployment of such size since Vietnam, active and Reserve component personnel were called upon to enforce national policy and American will.

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[1] *Hostage to Oil,* U.S. News & World Report, Oct. 8, 1990, at 56-64.

[2] *What Makes Hussein So Dangerous?,* U.S. News & World Report, Sept. 10, 1990, at 40.

[3] *Hostage to Oil, supra* note 1, at 57.

Since adoption of the total force policy, which placed significant support functions and units in the Reserve component, it was impossible to undertake such a massive deployment without activating reservists from all services. The presidential call up of 50,000 reservists under 10 U.S.C. section 673(b) on August 22, 1990, triggered a chain reaction throughout the nation that had significant economic. manpower, and family repercussions.*

During 214 years of American history, the United States has been involved in over 160 foreign hostilities.[5] Recognizing that the call of the American citizen-soldier to arms frequently results in total chaos to civilian business and family affairs, Congress has sought to provide these citizen-soldiers some protection through the Soldiers' and Sailors' Civil Relief Act (SSCRA).[6] What follows is the history of a joint-service effort to keep faith with the citizen-soldier in a modern environment by attempting to amend the Act—one whose ideal has stood the test of time, but whose armor has rusted and is in need of repair.[7]

11. GENESIS

The Civil War brought about the first major uprooting of hundreds of thousands of citizens turned soldiers. While they went off to the battlefield, families left behind faced the consequences of the breadwinner's departure—indebtedness, litigation, and foreclosures.[8] After three years of war, Congress was besieged with entreaties for pro-

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[4]10 U.S.C. § 673(b) (1988) (Presidential 200,000 Call-up Authority).

'Cruden, *The Warmaking* ***Process,*** A9 Mil. L. Rev. ***35,*** at 40 (1975).

[6]Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178 (1940) [codified as amended at 50 U.S.C. app. § 501-591 (1988)): *see* Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act, JA 260 (1990).

[7]The latter part of this article traces the progress of proposed amendments through the second session of the 101st Congress. Although these amendments were not enacted, Congress passed similar legislation after completion of this article. The Soldiers' and Sailors' Civil Relief Act [SSCRA) Amendments of 1991, Pub. L. No. 102-12, ___ Stat. ___ (1991). include nine sections containing substantive and technical changes to the SSCRA. The most significant changes raise the ceiling for protection from rent eviction to $1200 (50 U.S.C. App. § 530), extend powers of attorney indefinitely when executed by a service member who subsequently is classified as missing in action (50 U.S.C. App. § 591), provide professional liability protection (new section), provide reserve personnel health insurance reinstatement (new section), prohibit retaliation against those seeking protection under the SSCRA (new section), and clarify reserve personnel reemployment rights **(38** U.S.C. § 2024(g)). For an explanation of this later legislation, see the article entitled *Contemporary* ***Applications*** *of the Soldiers' and Sailors' Civil* ***Relief Act,*** elsewhere in this issue.

[8]W. Robinson, Justice in Grey 83-8 (1941).

tection of soldiers who had volunteered or had been drafted. On June 11, 1864, Congress responded with an act that suspended any action, civil or criminal, against federal soldiers or sailors while they were in the service of the Union and made them immune from service of process and arrest.[9] This protection provided only temporary relief because it merely tolled statutes of limitations; a final reckoning could be demanded upon the soldier's return.[10] Not to be outdone in protecting those who answered the call to arms, several of the states (Georgia, Tennessee, Alabama, and Texas, to name a few) enacted similar laws.[11] One South Carolina circuit judge aptly described the special relief for service members: "the State says to the creditor, (in a time of general distress,) you may not add to the calamity which overwhelms the land by harassing with lawsuits and sheriff's sales those who happen to be in your debt."[12]

While the idea of leaving one's family behind and marching off to war to defend local, state, or national interests is not something new to our nation, increasing interdependence brought about by the Industrial Age created new responsibilities for Americans in the late nineteenth and twentieth centuries. Urbanization, industrialization, and movement of families away from hereditary localities gradually reduced the support system that prevailed in many communities.

During the period 1865 to 1914, limited military actions transpired. It remained for the "Great World War" to renew the call for citizen-soldier protection. On March 18, 1918, the Congress once again provided legislative relief in the form of the Soldiers' and Sailors' Civil Relief Act.[13] This Act was the first comprehensive attempt to assist soldiers called to arms. It was designed

> to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during continuation of the present war.[14]

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[9] Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864).
[10] *Id.*
[11] W. Robinson, *supra* note 8, at 85.
[12] *Id.*
[13] Act of March 18, 1918, ch. 20, 40 Stat. 440 (1918).
[14] *Id.* § 100.

A. PERSONS PROTECTED IN 1918

This Act provided protection to active and Reserve component military personnel, members of the Public Health and Light House Service, and members of the Coast and Geodetic Survey.[15] Specifically, the Act protected persons in military service against default judgments by requiring plaintiffs in courts (state and federal) to file affidavits stating that defendants are not in military service or that they cannot determine whether they are in military service. Additionally, the Act required appointment of an attorney to represent a service member's interest before a default judgment could be entered.[16] The Act made the intentional filing of a false affidavit punishable by imprisonment not to exceed one year or a fine not to exceed $1000, or both.[17]

B. STAYS OF PROCEEDINGS IN 1918

Further protection was provided in the form of stays of proceedings affecting fines and penalties, judgments, and execution of civil actions, unless the court determined the service member's ability to conduct his or her defense was not "materially affected" by military service.[18] The Act also prohibited evictions without court orders for dwellings occupied chiefly by service members' spouses, children, or other dependents, as long as the rent did not exceed $50.[19] Installment contract terminations and repossessions also were forbidden without a court order.[20] The law provided guaranteed protection of payment of commercial life insurance premiums for policies with face values that did not exceed $5000,[21] and granted redemption rights for unpaid taxes or assessments extending six months after termination of service.[22] The SSCRA of 1918 had a limited duration; it expired six months after termination of the war.[23]

Between military conflagrations, little is done to care for the Army in waiting. In 1886, for example, Congress failed to pass an appropriations bill to pay its soldiers, requiring them to serve without

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[15] *Id.* § 101(1).
[16] *Id.* § 200(1).
[17] *Id.* § 200(2).
[18] *Id.* §§ 201-204.
[19] *Id.* § 300.
[20] *Id.* § 301.
[21] *Id.* §§ 400-415.
[22] *Id.* § 500.
[23] *Id.* § 602.

pay until November 1887.[24] Although the military was not often neglected to that extent, the years between World Wars saw the Depression unfold with no special protection available for those who marched and sailed from one post or port to another.

III. WORLD WAR II

Fourteen months before the bombing of Pearl Harbor, Congress resurrected the Soldiers' and Sailors' Civil Relief Act as the SSCRA of 1940, and stated its renewed purpose in the preamble:

> In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain classes, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which the Act remains in force.[25]

This legislation reenacted many of the provisions of the SSCRA of 1918 almost verbatim. It applied once again to active and Reserve component personnel in the military and naval establishments, including the Coast Guard and Public Health Service. Congress reinstated the stay of proceedings, postponement, and suspension provisions, as well as the default judgment, installment contract, mortgage, insurance, taxes, and public land provisions.[26] The Act included additional benefits with respect to public lands, changed the method of administering the provisions of guaranteed insurance premium protection, and raised from $50 to $80 the monthly rental of family dwellings in the noneviction provision (an increase of $30 after twenty-two years).[27] The Act was to remain in force until May 15, 1945, or if the United States was still engaged in a war, then it was to remain in force until it was terminated by a treaty of peace proclaimed by the President and for six months thereafter.[28]

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[24] R. Atkinson, The Long Grey Line 378 (1989).
[25] Act of Oct. 17, 1940, ch. 888, § 100, 54 Stat. 1178 (1940).
[26] *Id.* §§ 101-512.
[27] S. Rep. No. 2109, 76th Cong., 3d Sess. 4 (1940).
[28] H.R. Rep. No. 3030, 76th Cong., 3d Sess. 14 (1940).

The next chapter in SSCRA history was written on October 6, 1942, when the 77th Congress decided to make several major changes in protections offered members of the armed forces.[29] While only twenty-four months had expired since passage of the SSCRA of 1940, the impetus for change was found in the experience of actual hostilities:

> Important provisions of the Civil Relief Act extend only to obligations originating prior to the date of its enactment. Nearly **14** months later came the attack on Pearl Harbor and the consequent revision of plans and change of conditions. Persons who prior to December 7, 1941, had no thought of being selected for service or who had been selected and discharged or placed in the Enlisted Reserve Corps suddenly found themselves in a new status and in the meantime had undertaken new obligations. Experience under the Civil Relief Act during the year and a half of its existence has shown additional defects that require correction or clarification.[30]

What actually had occurred was that hundreds of thousands of soldiers and sailors were being drafted or mobilized, thus producing significant numbers of family and economic dislocations. Material changes in economic conditions of soldiers entering active duty resulted in numerous requests for assistance. Congressman Overton Brooks (D-Louisiana), member of the House Committee on Military Affairs, which considered the amendments, observed on the floor of the House:

> This bill springs from the desire of the people of the United States to make sure as far as possible that men in service are not placed at a civil disadvantage during their absence. It springs from the inability of men who are in service to properly manage their normal business affairs while away. It likewise arises from the differences in pay which a soldier receives and what the same man normally earns in civil life.[31]

Differences in pay was a key factor in Congress's decision to provide special protection for indebtedness existing prior to call up to active duty. The general consensus was:

> The people back home feel, and this Congress feels, that the

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[29] Act of Oct. 6, 1942, ch. 581, 56 Stat. 769 (1942).
[30] H.R. Rep. **No.** 2198, **77th** Cong., 2d Sess. 1 (1942).
[31] Cong. Rec. H5553 **(daily** ed. June 11, 1942) (statement of Rep. Brooks).

Nation's defenders should not be compelled to fight a battle on two fronts at once—one back home and the other on the firing line facing the enemies of democracy. We feel that the normal obligations of the man contracted prior to service induction should be suspended as far as practicable during this tour of duty, and that the soldier should be protected from defaulting his obligations due to his inability to pay caused by reduction in income due-to service.[32]

A. BAIL BONDS AND WAIVERS OF PROTECTIONS IN 1942

The first major change was the addition of a provision that made criminal bail bonds unenforceable during a period of military service.[33] This section specifically made bail bonds nonforfeitable to courts for service personnel.[34] The Act added a new provision that made waivers of protections of the Act— such as those concerning requests for stays of proceedings and simultaneous release of sureties and guarantors (when judgments or decrees were vacated or set aside in whole or part)—invalid if made prior to entry onto active duty.[35] This prevented creditors from taking advantage of soldiers by having them waive their SSCRA protections prior to induction.

B. NEW PERSONS PROTECTED IN 1942

The protections of the Act also were extended to United States citizens serving in the armed forces of any allied nation (e.g., Canada, China, and England).[36] Prior to America entering the war, some adventuresome patriots, like the French Escadrille of World War I, volunteered their services to those nations already at war with the Axis powers. Some even contracted out their services, such as the Flying Tigers.[37] Congress desired to offer the same protections to these early combatants that they offered to the members of the United States Armed Forces.

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[32] *Id.*
[33] Act of Oct. 17, 1940, ch. 888, § 103(3), 54 Stat. 1178 (1940).
[34] *Id.*
[35] *Id.* § 103(4).
[36] *Id.* § 104.
[37] Encyclopedia Americana, Flying Tigers, Vol. 11, at 478 (1972).

C. SSCRA DISSEMINATION REQUIREMENT IN 1942

Another amendment required the Secretary of War and the Secretary of the Navy to ensure that personnel serving and those entering military service were provided notice of the protections and benefits accorded them by the Act.[38] Understandably, protections offered by the newly amended SSCRA would be meaningless if the personnel affected were not aware of their rights. This unique provision survives to this very day.[39]

D. PREINDUCTION PROTECTION IN 1942

Congress also provided protection to those persons who were ordered to report for induction under the Selective Training and Service Act of 1940. This protection applied from their receipt of orders and ended upon the date these personnel reported for induction,-"' at which time active duty commenced and other provisions of the Act provided protection.[41]

E. WRITING REQUIREMENT IN 1942

Another provision clarified the right of a service member to make certain arrangements—modifications, terminations, and cancellations—with respect to contracts and obligations, but it required these arrangements to be in writing.[42] This requirement protected military personnel from third parties asserting claims and making representations without actual proof of the military member's intent and active participation. Given the absence of military personnel because of military service, this provided an important protection against misleading or false representations.

F. SUSPENSION OF STATUTE OF LIMITATIONS IN 1942

Congress also amended the tolling provision of the SSCRA, making it more comprehensive in scope. The new statute tolled, for the

[38]Act of Oct. 17, 1940. ch. 888, § 105, **64** Stat. 1178 (1940).
[39]*Id.*
[40]*Id.* § 106.
[41]*Id.* § 101(2).
[42]*Id.* § 107.

period of military service of a soldier or sailor, the running of any period limited by law, regulation, or order for the bringing of any proceeding in any board, bureau, commission, department, or other agency of government.[43] The statute also tolled any period during which property could be redeemed after sale to enforce any obligation, tax, or assessment.[44]

In developing the 1940 Act, Congress carried over the tolling provisions of the 1918 Act. On further review in 1942, however, it was determined that these provisions would be deficient in light of the 1924 United States Supreme Court decision in *Ebert v. Posten*,[45] which greatly weakened the 1918 tolling provisions.[46] In that case, Posten, a Michigan resident, sued to redeem a parcel of land from foreclosure made by advertisement and sale pursuant to state statute authorizing the action.[47] Posten enlisted in the Army in 1918 and had been discharged in 1919, three months after the redemption period expired on an earlier foreclosure and sale of his land.[48] The Court held that a strict reading of the provision revealed that section 205's protection did not apply to transactions that were undertaken without judicial action.[49] The justices found that the Michigan statutory right to redeem from a sale by advertisement is not a right of action, and thus not protected by the SSCRA of 1940.[50] They found it to be a primary right as distinguished from a remedy.[51] The 1942 SSCRA amendment addressed this shortfall by prohibiting inclusion of any period of military service when determining the period for bringing any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against a person in military service.[52]

G. INTEREST CAP ON INDEBTEDNESS IN 1942

Perhaps the centerpiece amendment to the SSCRA in 1942 was the addition of a new protection prohibiting interest at a rate in excess of six percent per annum upon all indebtedness incurred prior to

[43] *Id.* § 205.
[44] *Id.*
[45] 266 U.S. 540 (1924).
[46] S. **Rep.** No. 1558, 77th Cong., 2d *Sess.* 4 (1942).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Act of Oct. 17, 1940, ch. 888, § 205, 54 Stat. 1178 (1940).

entry upon active duty.[53] The Act contained, however, an important protection for creditors. Upon application, a creditor could petition a court for a determination that the ability of the service member to pay such debts was not materially affected by military service.[54] Under this section, a court could issue an opinion that the six-percent interest cap protection was inapplicable to a service member's debts because that person's military service had no "material affect" upon his or her ability to pay the debts.[55]

The same provision also contained a definition of the term "interest" that included service charges, renewal charges, fees, or any other charges (except life insurance) with respect to an obligation.[56] Missing from this section was a declarative statement concerning the type of interest that could be charged within the six-percent cap (e.g., simple or compound) and whether the difference between the preservice rate and the six-percent cap was deferred or forgiven. Legislative history provides some insight. The House and Senate Committees on Military Affairs' reports on the SSCRA amendments contained identical explanatory language with respect to the interest cap provision:

> Section 6 adds a new section 206 which prohibits interest at a rate in excess of 6 percent upon obligations of persons in military service incurred prior to his entry therein, unless such service has not materially affected his ability to pay. The present law (1940 SSCRA) does not prevent an accumulation of excess interest. The only relief now authorized for such cases is a stay of any proceeding commenced on such a claim during the period of military service.[57]

The Conference Committee Report is silent on this issue because no disagreement existed between the houses on this particular provision, allowing the two respective chambers' committee reports to be the final word.[58] Clearly, Congress genuinely was concerned about preexisting indebtedness of personnel prior to entry on active duty and the tremendous burden this created on them with reduced income, but fixed expenses. The absence of any protection against accumulation of interest and the prospect that returning soldiers would

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[53] *Id.* § 206
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] H.R. Rep. No. 2198, 77th Cong., 2d Sess. 4 (1942); S. Rep. No. 1558, 77th Cong., 2d Sess. 4 (1942).
[58] H.R. Rep. *So.* 2481, 77th Cong., 2d Sess. (1942).

face large indebtedness motivated Congress to create a forgiveness cap. Referring to this problem on the floor of the House, Military Affairs Committee member Overton Brooks addressed the issue by observing that this bill

> covers the case of the soldier who has entered into an obligation to pay interest, which in some states runs as high as 3 ½ percent per month, and which interest during his absence will accumulate far beyond the value of the property by which it is secured. This bill provides no interest charge during service shall exceed 6 percent per annum and thereby gives full protection to the soldier.[59]

The expressed intent of the drafters clearly is that the six percent is simple interest and the difference above the cap is forgiven. If interest above the cap was deferred rather than forgiven, a cursory arithmetical calculation reveals that a service member would owe more money coming off active duty than he did when entering it. Such a result clearly would have been contrary to the intent of the 77th Congress.

H. CONTRACT PROTECTIONS IN 1942

A new section was added to article III of the Act, involving rents, installment contracts, mortgages, liens, assignments, and leases. This provision eliminated prior restrictions contained in this article concerning the date a contract must originate to fall within the Act. This new provision prohibited exercise of any right or option to rescind or terminate the contract or resume possession of the property for nonpayment of any installment occurring prior to or during the period of military service except by action of a court of competent jurisdiction.[60] A new section expanded the previous protection to prohibit foreclosures of chattel mortgages, other than those occurring under power of sale or warrant of attorney, and to prohibit judgment by stipulation without institution of legal proceedings.[61]

I. AUTOMOBILE REPOSSESSIONS IN 1942

If the other provisions do not sufficiently demonstrate the patriotic zeal for soldiers and sailors during this post-Pearl Harbor time period,

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[59]Cong. Rec. H5553 (daily ed. June 18, 1942) (statement by Rep. **Brooks).**
[60]Act of Oct. 17, 1940, ch. 888, § 205, 54 Stat. 1178 (1940).
[61]*Id.* § 302.

repeal of a 1940 SSCRA section that authorized, in certain circumstances, the repossession of automobiles of personnel in military service, served as yet another manifestation of congressional concern.[62]

J. FORECLOSURES IN 1942

In the area of court-ordered foreclosures, Congress demonstrated genuine concern for protecting service members' property rights by giving state and federal courts authority to appoint three disinterested parties to appraise personal property that was the subject of a stay under the Act. Rased upon the appraisal, the court could order that this sum be paid to the military member or his dependent as a condition to foreclosing the mortgage upon the property or resuming possession of the property under the contract.[63]

K. LEASE TERMINATIONS IN 1942

Another added protection was a provision relieving personnel called into the armed forces from liability for rent accruing under leases subsequent to their induction.[64] This provided carte blanche authority for newly inducted or called up service personnel or volunteers unilaterally to break private dwelling or commercial leases to which they were a party.[65] The only requirement was that the lessee still was obligated for thirty-days rent after the next date monthly rent normally was payable.[66]

L. LIFE INSURANCE IN 1942

Congress raised the ceiling of guaranteed policy premium coverage on private commercial life insurance policies from $5000 to $10,000. For the first time, it also covered policies that had been assigned to secure the payment of an obligation, provided no premiums were due or unpaid.[67]

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[62] Act of Oct. 6, 1942, ch. 581, § 11. 56 Stat. 769 (1942).
[63] Act of Oct. 17, 1940, ch. 888, § 303, 54 Stat. 1178 (1940).
[64] *Id.* § 304.
[65] H.R. Rep. No. 2481, 77th Cong., 2d Sess. 5 (1948).
[66] Act of Oct. 17, 1940. ch. 888, § 304, 54 Stat. 1178 (1940).
[67] *Id.*

M. STORAGE LIENS IN 1942

The Act contained new protection from foreclosure without court order of storage liens on household goods stored for the period of military service.[68] Congress wanted to be certain that the enforcement of liens for the storage charges on household goods, furniture, and personal effects of service members would be subject to court supervision.[69]

N. TAXES IN 1942

Congress amended the taxation provision of the 1940 SSCRA to provide protection against sale of personal property without court supervision.[70] Congress eliminated the previous requirement that the taxes must have fallen due during the period of military service, and also the affirmative requirement for the military member to file an affidavit with the tax collector to prevent sale of property for delinquency without court action.[71]

A new protection was provided to prevent multiple state taxation of property and income owned by military personnel within various taxing jurisdictions where they may be serving pursuant to orders.[72] Prior to this enactment, personal property and income of military personnel could be subject to taxation by several states within the same calendar year.[73] This protection was made retroactive to September 8, 1939, the date when President Roosevelt declared a state of limited emergency.[74]

O. GENERAL RELIEF IN 1942

Under the 1940 SSCRA, all suspended taxes and assessments had to be paid within six months after release from active duty.[75] The 1942 amendment to this section provided yet another protection to military personnel by granting them, during the period of military service, and up to six months thereafter, authority to apply to a court

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[68] *Id.*
[69] H.R. Rep. No. 2481, 77th Cong., 2d Sess. (1942).
[70] Act of Oct. 6, 1942, ch. 581, § 14, 56 Stat. 769 (1942)
[71] *Id.*
[72] *Id.* § 17.
[73] H.R. Rep. No. 2481, 77th Cong., 2d Sess. 6 (1942).
[74] *Id.*
[75] *Id*

for relief with respect to any obligation or liability incurred by them prior to active duty or in respect to any tax or assessment, whether falling due prior to or during military service.[76] The purpose behind this provision was to provide an opportunity for military personnel to liquidate their liabilities in an orderly fashion and not be faced with the financial stress of having to cope with all of them at the same time.[77]

Furthermore, this new protection provided a catchall protection authorizing courts to grant, upon application, any further relief necessary to stay financial obligations for a period of time equal to the military service, or, in the case of mortgages and contracts, for a period of time equal to the remaining life of the contract plus the period of military service.[78] This was a major means of assistance to those called up and newly inducted personnel who suddenly found themselves faced with significantly reduced income, but who were still obligated for fixed indebtedness incurred under a prior income structure.

The above summary highlights the significant changes made by the 1942 amendments to the 1940 SSCRA. Not all the technical and clarification changes that were made by the amending Act have been addressed because of their number and minor impact on the overall new protections. The 1942 amending Act radically changed the degree and scope of public protection initially provided by the SSCRA of 1918, later reenacted as the SSCRA of 1940.

During the war years, Congress legislated with lightning speed. Only fifteen days after passing the amending Act of 1942, Congress amended it again to address income tax collection. This amendment provided that the SSCRA tolling provision did not apply to internal revenue law computations of the period for bringing any action.[79] If the Internal Revenue Service determined that delay would jeopardize its collection effort, this provision clarified its right to start proceedings despite the SSCRA tolling provision.[80] The war effort required financial support from all citizens, regardless of status.

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[76]Act of Oct. 6, 1942, ch. 581, § 18, 56 Stat. 769 (1942).
[77]S. Rep. No. 1558, 77th Cong., 2d Sess. 11 (1942).
[78]Act of Oct. **6,** 1942, ch. 581, § 18, 56 Stat. 769 (1942).
[79]56 Stat. 964, ch. 619 (1942).
[80]*Id.*

IV. LATER AMENDMENTS

A. STATE TAXATION IN 1944

On July 3, 1944, Congress again returned to the SSCRA, amending it to create an additional protection involving state taxation.[81] It specifically provided that a service member did not lose domicile by virtue of absence due to military orders.[82] Military compensation could not be taxed by a state that was not the member's domicile.[83]

B. LIFE INSURANCE IN 1948

In 1948, Congress amended the life insurance provision to order that any refunds received for payment of premium debts incurred under the premium protection provision would be credited to the appropriation for payment of claims made by this SSCRA authority.[84] This served as an attempt to keep premium protection funds self-sustaining.

C. PERMANENT SSCRA PROTECTIONS IN 1948

Later that year after the SSCRA had expired, Congress reconsidered the issue of whether some form of continuing protection was still necessary for members of the armed forces. This deliberative branch wisely decided that in a Cold War world it might be more advantageous to the national defense to resurrect the entire SSCRA as previously amended. The vehicle used was the Selective Service Act of 1948. Buried within it was a provision specifically making SSCRA protections applicable to all persons in the armed forces until repealed or terminated by subsequent act.[85] Because the amended SSCRA no longer existed, Congress had to use another statute to resurrect it, rather than undertake the laborious task of passing a new stand-alone bill.

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[81] 58 Stat. 722, ch. 397, § 1 (1944).
[82] *Id.*
[83] *Id.*
[84] 62 Stat. 160, ch. 170, § 6 (1948).
[85] 62 Stat. 623, ch. 625, tit. I, § 14 (1948)

D. CRIMINAL PENALTIES IN 1952

During the Korean War, Congress revisited the SSCRA only once, in 1952, and even then for only a minor muscle-building measure.[86] A criminal penalty of up to one-year confinement or a fine up to $1000, or both, was established for knowingly making or causing to be made any sale or foreclosure, or seizure of property involving a service member's mortgage, trust deed, etc., without adhering to the SSCRA requirement to obtain a court order.[87] Congress viewed such action as necessary to prevent unconscionable entrepreneurs from taking advantage of a soldier's or sailor's absence.

E. VETERANS' ADMINISTRATION REPORTS IN 1958

A minor housekeeping chore was enacted in 1958 when Congress repealed the requirement for the Administrator of the Veterans' Administration to make annual reports to Congress regarding the SSCRA guaranteed life insurance program.[88]

Two years later, in 1960, Congress added a provision permitting establishment of certain facts by a declaration under penalty of perjury in lieu of affidavit in default proceedings.[89] This amendment permitted proof concerning military or nonmilitary status to be shown by an unsworn statement if applicable state law permitted proof by unsworn statements in lieu of affidavits.[90] This essentially conformed federal law to state law for purpose of default proceedings.[91]

F. PERSONAL PROPERTY TAX EXEMPTION IN 1962

In 1962, Congress added a new protection in the area of taxation by inserting a provision exempting from taxation by nondomiciliary states personal property belonging to service members residing outside of their domicile pursuant to orders.[92] An aggravating problem

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[86] 66 Stat. 151, ch. 450 (195%).
[87] *Id.*
[88] 72 Stat. 1272, ch. 857, § 14(76) (1958).
[89] 74 Stat. 820 (1960).
[90] H.R. Rep. No. 1309, 86th Cong., 2d Sess. 2 (1960).
[91] *Id.*
[92] 76 Stat. 768, ch. 771 (1962).

that still exists to some extent today is the attempt by state and municipal governments to tax personal property of soldiers who are not citizens of their states, but who reside there incident to service.

G. RENT EVICTION CEILING IN 1966

During the Vietnam era, Congress returned once again to the SSCRA in 1966 and amended the rent eviction ceiling from $80 to $150 (an increase of $70 after twenty-six years).[93] The last time it had been increased was in 1940, when it was raised from $50 to $80.

H. POWERS OF ATTORNEY IN 1972

Toward the end of American participation in Vietnam in 1972, when prisoner of war issues were gaining national attention, Congress created a new provision in the SSCRA with respect to powers of attorney.[94] This new protection legislatively extended the effective life of a power of attorney indefinitely for service members listed as missing in action prior to the date of this enactment.[95] As a result, this entire provision applied only to military personnel who executed powers of attorney during the Vietnam era (1963 - 1972).[96] The new section prospectively stipulated that a power of attorney could not be extended if the power of attorney clearly indicated that the granted power expired on a specified date and was executed after the date of this enactment.[97] Thus, no lasting protection was created for powers of attorney executed after October **24,** 1972.

V. IMPETUS FOR CHANGE IN THE 1990'S

With adjustments to longer and more frequent deployments, greater financial and family responsibilities, and a more mobile society as a whole, changes are needed to the statutory protections as they now exist. Updating the SSCRA to meet contemporary burdens will enable military personnel to focus on the national defense and mission needs of their units without time-consuming distractions. The Act requires only technical and legislative clarifications, not the creation of major new forms of protection.

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[93] 80 Stat. 28, ch. *358,* § 10 (1966).
[94] 86 Stat. 1098, ch. **540,** tit. V, § **504** (1972)
[95] *Id.*
[96] *Id.*
[97] *Id.*

Based on the rapidly changing domestic and international environment, and in response to litigation and large deployments involving service members and family law issues, the Legal Assistance Branch of the Administrative and Civil Law Division of The Judge Advocate General's School, United States Army, undertook an intensive review and identified areas in the SSCRA in need of repair.

In January 1990, they submitted four recommendations to Army Legal Assistance, Office of The Judge Advocate General of the Army, for review and further action.[98] In March 1990, a legislative aide for Congressman Kweisi Mfume (D-Maryland), contacted Army Legal Assistance and the Office of Army Congressional Liaison, requesting information on potential amendments to the SSCRA the Department of Defense was interested in.[99] A meeting was held, at which time several ideas were exchanged, with offers to provide written proposals at a future date.[100] Subsequent to this, Army Congressional Liaison received guidance from the Office of General Counsel, Department of Defense, indicating that proposed amendments should not be pursued for fear that in the amending process one or more of the Act's most favorable provisions might be deleted.[101] Accordingly, Congressional Liaison communicated to the Congressman's office that Department of the Army interest had waned.[102]

On August 2, 1990, Saddam Hussein became directly responsible for rekindling Department of Defense resolve to seek amendments to the SSCRA. With the presidential call up of 50,000 reservists and National Guard personnel, interest in SSCRA protections rocketed to center stage. An interservice task force was formed to identify and draft needed clarifications to the Act. Chaired by the Chief Legislative Counsel of Army Congressional Liaison, the task force included representatives from all the services' legal assistance offices.

On August 27, 1990, based on the four changes recommended by The Judge Advocate General's School, Army Legal Assistance submitted four major amendments to the Act. The first amendment in-

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[98]Memorandum from Major James P. Pottorff. to Chief, Legal Assistance Office. subject: Recommended Legislative Changes to the Soldiers' and Sailors' Civil Relief Act (Jan. 18, 1990).

[99]Memorandum from Major Gregory M. Huckabee, to Chief, Legislative Policy, Office of the Assistant Secretary of Defense (FM). subject: Proposed Amendments to the SSCRA (Jan. 19. 1990) [hereinafter Proposed Amendments].

[100]*Id.*

[101]Interview with Colonel John Cruden, Chief Counsel. Army Congressional Liaison Office, Jan. **24,** 1990.

[102]*Id.*

volved stays of proceedings.[103] Section 201 of the Act authorized courts to issue stays of proceedings upon application from service members involved in litigation. Some courts, however, which otherwise did not have in personam jurisdiction, concluded that any such request under the SSCRA constituted the requisite appearance for jurisdictional purposes. These holdings effectively undercut the entire purpose of the stay provision.[104] Instead of granting the requested stay, some courts would treat the application for a stay of proceedings as an appearance, deny the temporary stay request, and proceed to enter a default judgment against the absent service member.[105]

A prerequisite for reopening a default judgment under section 200(4) is that the service member must not have made an appearance. Therefore, in some courts, even if soldiers had meritorious defenses, they would be deprived of the opportunity to vindicate their rights because their applications for stays were used against them to establish jurisdiction.[106] This created a classic legal "catch-22."

Consider the case of *Skates v. Stockton*,[107] in which a paternity action was brought against a Marine while he was assigned overseas in London. A Marine judge advocate sent a letter to the clerk of the superior court and a copy to the plaintiff's attorney requesting a stay until the defendant could take leave to see that his interests were protected. At the end of the letter, the judge advocate stated: "This letter is in no way intended to be an appearance or answer in the action or to be a waiver of his protections under the Act."[108]

No order was entered by the trial court either granting or denying the request for a stay.[109] When the defendant failed to appear at a subsequent hearing, a default judgment was entered.[110] At a later hearing to vacate the judgment and order to show cause, the defendant's counsel filed a special appearance and motion to dismiss for lack of personal jurisdiction.[111] The trial court found that the letter from the legal assistance attorney constituted a general appearance whereby the defendant submitted to personal jurisdiction, and the

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[103]50 U.S.C. § 521 (1988).
[104]Memorandum from LTC Donald L. Hansen, to Chief, Office of Congressional Liaison, subject: Recommended Legislative Changes to the Soldiers' and Sailors' Civil Relief Act (Aug. 27, 1990).
[105]*Id.*
[106]*Id.*
[107]683 P.2d 304 (Ariz. Ct. App. 1980).
[108]*Id.* at 305.
[109]*Id.*
[110]*Id.* at 306.
[111]*Id.*

court upheld the default judgment.[112] The Court of Appeals for Arizona agreed, quoting a *Military Law Review* article summarizing the problem:

> [T]he courts have consistently held when a serviceman makes an appearance he is no longer entitled to the benefits of section **520** of the act and that in every recorded instance attempts to characterize appearances as "special" to contest jurisdiction have failed.[113]

Careful reflection of the drafter's original intent of the stay provision leads to the logical conclusion that its purpose and intent was to serve notice to a court of a service member's status and inability to defend his or her interests because of the demands of military service. This provision, like others in the Act, was intended to be a shield, but ambiguity has turned it into a sword used against the absent service member.

This ambiguity in section 201 has continued to cause significant tribulations for service members in other ways as well, because any act before a court by a service member or the service member's attorney, can be construed as an appearance, depriving him or her of section 200's default judgment protection. In *Blankenship v. Blankenship*[114] a service member's counsel filed an affidavit asking the court to quash the complaint and the service, or continue the action until the military defendant could appear. The court denied all requests and held that this request conferred jurisdiction by appearance, and the court entered a default judgment.[115] In *Reynolds v. Reynolds*[116] the service member's counsel filed a motion to dismiss for lack of jurisdiction, an action that the trial court held constituted an appearance. In *Vara v. Vara*[117] the service member made a motion to quash service and was held to have made an appearance. Clearly these results are not in keeping with the drafters' intent, and they merit immediate clarification.

The Army proposed the following amendment to remedy section 201's ambiguity by adding after the last sentence:

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[112] *Id.*

[113] *Id.*; Chandler, *Impact of a Request for Stay Under the* ***Soldiers'*** *and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 169 (1983).

[114] 82 *So.* 2d 340 (Ala. 1952).

[115] *Id.*

[116] 134 P.2d 251 (Cal. 1943).

[117] 171 N.E.2d 384 (Ohio 1961).

> An application for such a stay under this Act, whether by letter, affidavit, court appearance, or other means, shall not constitute an appearance for purposes of personal jurisdiction over a person in military service.[118]

Second, in an effort to remedy the default judgment problem of attempting to reopen a judgment after an application for a stay had been construed as an appearance, the following amendment to section 200(4) was proposed in the form of an addition at the end of the last sentence:

> An application for a stay pursuant to section 201 of this Act shall not be an appearance that would preclude a service member from reopening a default judgment.[119]

This amendment effectively would enable service members to reopen default judgments when their only communications to courts have been requests for stays pursuant to the SSCRA.[120] If the proposed change is not enacted, some courts will not only continue to exercise personal jurisdiction based on a service member's communication and application for a stay (as earlier illustrated), but also will refuse to reopen default judgments previously entered.[121]

The third area of concern in need of technical update is the rent eviction ceiling provision, section 300(1). This provision was last amended in 1966 and set the ceiling of protection for eviction from leased housing without court order at $150.[122] After twenty-four years, increase in market rental rates outstripped the qualification ceiling, making the provision inapplicable to service personnel and their families. In an effort to update this figure and provide a permanent resolution to the task of periodically having to readjust the ceiling figure, the following amendment was recommended to delete section 300(1)'s first sentence and replace it with the following:

> No eviction of distress shall be made during the period of military service in respect of any premises occupied chiefly for dwelling purposes by the spouse, child, or other dependent of a person in military service, for which the agreed rent does not

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[118] Proposed Amendments, *supru* note 99.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] In the SSCRA Amendments of 1991, Congress raised this ceiling to $1200. *See supru* note 7.

> exceed the monthly basic allowance for quarters, with dependents, plus, any other additional monthly housing allowances, if any, to which that person is entitled under the provisions of chapter 7 of title 37, United States Code, except as ordered by a court of competent jurisdiction.[123]

This amendment would provide a permanent and yet flexible answer to a continuing legislative problem of trying to provide rent eviction protection while at the same time trying to keep pace with inflation. Linking the statutory value to quarters allowances would allow for automatic adjustments in the rent ceiling.[124] The problem posed by setting a specific figure is that high cost living areas such as Alaska, Hawaii, or Washington, D.C., might exclude large numbers of service members from rent eviction protection who may need it most.

The fourth section in need of clarification is 514(1), Residence for Tax Purposes. Indirect taxation of military income is a growing problem throughout the United States. A change is needed to address indirect taxation of military income through state tax schemes that use military income to upwardly adjust the rate at which nonmilitary spouses pay taxes on their income.[125] The typical practice is to require those couples filing joint federal income tax returns to include the service member's income for purposes of determining the nonmilitary spouse's state income tax bracket on her state tax return.[126] Instead of paying the tax due on the nonmilitary spouse's income alone, the spouse's tax liability is increased by adding in the nonresident military spouse's income, ultimately leading to a greater total tax liability. The drafters' intent of section 514(1) was to prevent the possibility of multiple state taxation of income and property of military personnel.[127]

The Justice Department tried to eliminate this problem when it filed an action against the State of Kansas and claimed that certain Kansas income tax statutes violated the SSCRA by taking the military pay of such nonresidents into account in determining the rate of income tax to be levied on their nonmilitary income earned in Kansas. Having lost at the federal district court level, the Department of Justice made an appeal to the Tenth Circuit Court of Appeals.[128] This

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[123]Proposed Amendments, *supra* note 99, at 2
[124]*Id.*
[125]*Id.* at 3.
[126]United States v. Kansas, 810 F.2d 935 (10th Cir. 1987).
[127]*Id.* at 937.
[128]*Id.*

court held that neither the legislative history nor the plain language of the SSCRA prohibits the use of the described military income to set rates of taxation on other income.[129] The court also pointed out that the SSCRA cannot be interpreted beyond its plain language and express purpose.[130] Because this new form of state tax scheme was developed some forty-two years after passage of the Act, the drafters failed to consider or even envision the possibility of indirect taxation of military income and provide protections against it. To meet this plain language test, the drafters' intent must be clarified. The following clarification was proposed to remedy this by adding after the second sentence of the subsection in 514(1):

> Servicemembers' military income will not be added to nonmilitary spouses' income for purposes of calculating state and local income tax rates on such nonmilitary spouses' income, nor will servicemembers' military income be considered for any purpose associated with calculating state and local income tax liability on such nonmilitary spouses' income.[131]

These four recommendations were submitted to the Armed Forces SSCRA Task Force for consideration. After some discussion, the Task Force adopted verbatim the first three recommendations involving stays, default judgments, and the rent eviction ceiling. The state income tax recommendation was not adopted as a recommended action for fear it would generate so much opposition from various state lobbying groups that it might endanger the entire SSCRA amendment package. The three adopted amendments were transformed into congressional bill language with sectional analysis by the Legislative Branch, Administrative Law Division, Office of The Judge Advocate General, and were forwarded to the Office of the Assistant Secretary of Defense (Force Management & Personnel) (OASD-FM&P) for further action at the end of August 1990.[132]

VI. THE GAUNTLET

The Department of Defense has an institutional series of staffing requirements through which all legislative proposals must pass. The SSCRA amendments were no exception. Many thought, however, that

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[129] *Id.* at 938.
[130] *Id.*
[131] *See* Proposed Amendments, *supra* note 99.
[132] Proposed Amendments to the Soldiers' and Sailors' Civil Relief Act of 1940, A Draft Bill, Army Legal Assistance, Office of The Judge Advocate General (Aug. 1990).

the timing of Desert Shield might provide a window of opportunity for expeditious consideration and passage of legislation that would ameliorate some of the concerns of Reserve component soldiers being called to active duty pursuant to the President's authority under 10 U.S.C. section 973(b).

After the services reached agreement on the nature and language of the SSCRA amendments and transmitted them to DOD for further consideration, OASD (FM&P) developed its own version of proposed amendments and sent them back for comment to service legal assistance chiefs in early September. Several DOD changes produced significant comment. The stay provision was changed to read at section 200:

> Notification of military service, a request for compliance with this Act, and any other communication in any form from a person in military service, other than a specific request for a stay of proceedings pursuant to section 201 of this Act (50 U.S.C. App. section 521) that includes a specific reference to such section, shall not constitute an appearance for purposes of this section nor deprive a person in military service of the opportunity to reopen a default judgment in accordance with the provisions of this Act.[133]

With respect to the default judgment provision, section 200(4), OASD (FM&P) proposed the following:

> An application for a stay pursuant to this section must include specific reference to this section of the Act and may constitute an appearance for purposes of section 200 (50 U.S.C. App. section 520) of this Act.[134]

Their proposed version of the rent level was considerably different as well:

> by striking out the words "$150 per month" and substituting in lieu thereof the following: "$650 per month or such other amount as may be prescribed in regulations."[135]

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[133]Proposed Amendments to the Soldiers' and Sailors' Civil **Relief** Act **of** 1940. A Draft Bill, Assistant Secretary **of** Defense (Force Management) (Sept. 1990).

[134]*Id.*

[135]*Id.*

Two new proposals also were submitted to the services for review. The first involved clarification of the maximum rate of interest that could be charged under section **206** by adding:

> nor shall interest in excess of 6 per centum simple interest accrue during such period of military service or be collectible after such period of military service.[136]

The second one involved adding a new section 592, which prohibited adverse action against service members who exercised rights under this Act and made it effective before, on, or after the date of enactment of this Act:

> The exercise of rights provided by this Act regarding obligations, liabilities, taxes, fines, penalties, and insurance shall not be considered to reflect adversely on the ability of a person in military service to satisfy such obligations, liabilities, taxes, fines, penalties, and insurance and may not be the basis for adverse credit reporting by organizations regarding such persons.[137]

Faced with substantial revisions to its initial SSCRA amendment submission, service legal assistance representatives communicated their disagreement on September 6, requesting a meeting with OASD (FM&P) on September 7, 1990, to voice their objections to the OASD draft.[138] At the end of this SSCRA summit, OASD agreed to drop its section 201 proposal in favor of that offered earlier by the armed services.[139] With respect to section 200(4), the services felt the section was redundant and thus recommended that it be deleted. The services believed that section 201's clear language was preferable because it provided that application for a stay of proceedings could not constitute an appearance for any purpose.[140]

The armed services strongly disagreed with section 300's rent eviction ceiling of $650 because placing a specific dollar figure ultimately would push DOD into a bargaining procedure. This could result in a new reduced figure that essentially prohibited application of the provision's protection by service personnel living in high cost rental areas, such as Hawaii, Alaska, and Washington, D.C.[141] OASD indicated

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[136] *Id.*
[137] *Id.*
[138] Memorandum for Record, subject: SSCRA Proposed Amendments Meeting with OSD Rep., Major Gregory M. Huckabee, Army Legal Assistance, Office of The Judge Advocate General (Sept. 10, 1990).
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1, 2.

that Veterans' Committee staffers in Congress were pushing a $510 figure, while the Veterans' Administration was recommending $750.[142] OASD had decided to split the difference and recommend $650 even though it would exclude many military personnel in high cost areas. They believed it was the best we could expect to get enacted.[143] The two new recommendations involving clarification of section 206's interest rate cap provision and section 592's protection against adverse credit discrimination were endorsed.[144]

On September 10, 1990, OASD (FM&P) notified the armed services' legal assistance chiefs that the final draft of DOD's proposed SSCRA amendments was ready for review. After careful review and discussion, the Assistant Judge Advocate General for Military Law, Office of The Judge Advocate General, concurred in the draft package for the Army, except for the rent ceiling provision. He maintained that the armed services' recommendation was a better proposal because it did not discriminate against those service personnel who need it most—those living in high cost rental areas.[145] Despite this last attempt to include all service members in the rent ceiling eviction provision, DOD forwarded its package to the Office of Management and Budget (OMB), Executive Office of the President, on September 19, 1990, for executive clearance in accordance with OMB Circular A-19 prior to submission to Congress.[146]

If getting the SSCRA amendment proposals out of the Pentagon was a lesson in administrative footwork, what awaited the package at OMB was a travail of a different nature. OMB sent the proposed amendments to a number of other executive agencies for comment. On October 1, 1990, the Council of Economic Advisers (CEA), Executive Office of the President, issued an opinion objecting, not to any of the proposed changes, but to the continued "preferential treatment of interest payments for reservists recalled to active duty."[147] In essence, CEA objected to DOD's failure to include an amendment either raising section 206's interest cap from 6 percent to a higher figure or deleting it altogether:

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[142] *Id.* at 2.

[143] *Id.*

[144] *Id.*

[145] Memorandum from Brigadier General Donald W. Hansen, to Chief of Congressional Liaison, subject: SSCRA Amendments (Sept. 10, 1990).

[146] Letter from Terrence O'Donnell, General Counsel of the Department of Defense, to Richard G. Darman, Director, Office of Management and Budget (Sept. 19, 1990).

[147] Memorandum from Richard Schmalensee, Council of Economic Advisers, Executive Office of the President, to Director, OMB, ATTN: Assistant Director for Legislative References, subject: Draft Legislation "To Amend the Soldiers' and Sailors' Civil Relief Act of 1940" (Oct. 1, 1990).

> While there may be circumstances under which the Federal Government may wish to cushion the income losses of reservists called to duty, limiting interest payments to a simple six percent rate is a poor way to achieve that objective. We cannot support subsidizing reservists who have incurred large debts, while reservists who behaved differently receive no income supplement.[148]

CEA served what constituted an ultimatum on DOD. If DOD would not delete or raise the six-percent interest cap, CEA would not provide its concurrence, thus depriving DOD of OMB's clearance of the SSCRA package for submission to Capitol Hill. CEA implacably stated its position when it said: "The interest rate provisions of the Soldiers' and Sailors' Civil Relief Act should either be updated to reflect current market conditions in accordance with the original legislative intent, or they should be discarded."[149]

OMB sent this CEA response back to DOD for comment, which placed the SSCRA amendment package in bureaucratic limbo while the waning days of Congress ticked by with everyone immersed in budget negotiations.[150] Faced with this impasse, the armed services and OASD (FM&P) searched for a means to extract the package from OMB without conceding an issue not even contained in the amendment proposals. On October 5, 1990, it appeared the assistance of a high level DOD official would be necessary to obtain clearance for the SSCRA amendments. On behalf of all the armed services' Judge Advocate Generals, the Army Assistant Judge Advocate General for Military Law sent a memorandum to the DOD Assistant Secretary for Force Management & Personnel requesting that the Deputy Secretary of Defense intercede at OMB to obtain clearance of the SSCRA amendments before the 1Olst Congress adjourned.[151]

DOD placed the call, and OMB subsequently agreed to release the amendment package if the section 206 interest cap clarifications were deleted. This was done to speed consideration of the remaining amendments before Congress adjourned.[152] The amendments were

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[148] *Id.*

[149] *Id.*

[150] Memorandum from Janet Rice Forsgren, OMB, to Sam Brick, Legislative Liaison Officer, DOD, subject: CEA comments on Defense draft bill, "To Amend the Soldiers' and Sailors' Civil Relief Act of 1990" (Oct. 1, 1990).

[151] Memorandum from Brigadier General Donald W. Hansen, to Assistant Secretary of Defense (FM&P), subject: Draft Legislation "To Amend the Soldiers' and Sailors' Civil Relief Act of 1940" (Oct. 5, 1990).

[152] Interview with Chief, Legislative Affairs, OASD (FM&P) (Oct. 10, 1990).

cleared, returned to DOD, and the remaining survivors were transmitted to the Speaker of the House of Representatives on October 9, 1990.[153] The SSCRA amendments were introduced by Congressman Sonny Montgomery into the House of Representatives as H.R. 5814 and referred to the House Veterans' Affairs Committee on October 11, 1990.[154] The bill was cosponsored by twenty-three Democrats and ten Republicans.[155]

Prior to DOD's October 9th legislative submission, Congress had indicated its interest in considering possible amendments to the SSCRA in view of Operation Desert Shield when it sent an invitation to the Secretary of Defense to testify before a rare joint session of the Senate and House Veterans' Affairs Committees to be held on September 12, 1990.[156] The purpose of the joint hearing was concisely stated:

> The central focus of the hearing will be whether the protections provided to those who have been called up are sufficient and whether current law should be amended. We invite you or the Deputy Secretary to testify and present the views of the Department of Defense on the Soldiers' and Sailors' Civil Relief Act.[157]

The Assistant Secretary of Defense for Force Management & Personnel presented OSD's position that four areas needed revision in the SSCRA: stay provisions, unresolved issues concerning the six-percent interest cap, the need to protect credit ratings of service members who assert their SSCRA rights, and the unrealistic eviction rent ceiling limitation of $150.[158] A number of other witnesses testified from other government agencies, private military associations, and financial institutions.[159] At the conclusion of the first panel's testimony, Chairman Montgomery requested that recommended changes be sent to the Veterans' Affairs Committees within the next

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[153]Speaker Letter and Draft Legislation to Amend SSCRA, Terrence O'Donnell, General Counsel for the Department of Defense (Oct. 9, 1990).

[154]H.R. Rep. No. **5814,** 101st Cong., 2d Sess. (1990).

[155]*Id.*

[156]Letter from Rep. G.V. (Sonny) Montgomery and Sen. Alan Cranston, to Secretary of Defense, Invitation to Testify Before Joint Senate-House Veterans' Affairs Committee on September **12,** 1990 (Aug. 30, 1990.)

[157]*Id.*

[158]Testimony of Honorable Christopher Jehn, Assistant Secretary of Defense (Force Management and Personnel), Joint Hearing Committees on Veterans' Affairs, United States Senate, House of Representatives, 101st Cong., 2d Sess. (Sept. 12, 1990); Hearing Resume, Office, Chief of Legislative Liaison, Dep't of Army.

[159]*Id.*

two weeks (Sept. 26th).[160] As it turned out, because of OMB's inaction, DOD missed the deadline by two weeks (Oct. 9th), just as Congress entered its protracted final budget negotiations.

Meanwhile, failing to receive the promised DOD SSCRA amendments, the House Veterans' Affairs Committee moved to consider its own bill. On October 12th the Committee held its bill markup session and voted to report the bill to the House.[161] At this session the Committee used both its own bill and that submitted by DOD to develop the final bill that was voted on and reported to the House.[162] The result was once again a smaller loaf. Three bright spots were in the bill: the first incorporated section 201's stay provision verbatim as recommended by the armed services and DOD; the second raised section 300's eviction rent ceiling from $150 to $1200, and the third extended section 701's power of attorney authority for service members missing in action after August 2, 1990.[163]

On the down side, no clarification was obtained concerning whether the six percent was simple interest or about the forgiveness ambiguities of section 206. According to a Congressional Research Service Legal Memorandum, which supported such an interpretation, clarification demonstrating Congress's intent was needed:

> [T]he precise meaning of the provision of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, which restricts interest payable by servicemembers on debts incurred prior to their entry into service to no more than 6 percent per year, unless a court determines that entry into service has not materially affected their ability to pay, cannot be ascertained with certainty from the relevant legislative history or existing judicial precedent. However, it should be noted that guidance as can be derived from relevant legislative history and case law offers some support for the proposition that interest in excess of the prescribed six percent rate that would otherwise accrue during the period of active service must be permanently forgiven by the lender but that same legislative history and case law affords no support for the proposition that the lender can recover such excess interest subsequent to the active service of the borrower (for example, through additional payments that simply stretch out the period over which the principal is to be paid).[164]

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[160] *Id.* at 5.
[161] H.R. Rep. No. 862, 101st Cong., 2d Sess. (1990).
[162] *Id.*
[163] H.R. Rep. No. 5814, 101st Cong., 2d Sess. (1990).
[164] Cong. Research Service, Library of Congress, American Law Division, The Interest Rate Cap of the Soldiers' and Sailors' Civil Relief Act of 1940, As Amended, Robert B. Burdette (Aug. 27, 1990).

The House bill also included professional liability protection for physicians ordered to active duty in the armed forces,[165] provided for health insurance reinstatement upon reemployment pursuant to the Veterans' Reemployment Rights Law, 38 U.S.C. section 2021(b)(1), and included several technical amendments to the SSCRA.[166] Conspicuous by its absence was any mention of credit protection against adverse action because of the exercise of SSCRA rights. In trying to speed the amendments through during the closing hours of Congress, the credit protection provision was left out for fear it might slow the surviving amendments on their way to final passage by connecting it to the six-percent interest credit cap issue.[167] The bill was reported to the House on October 13, 1990, and was placed on the Union calendar.[168]

All bills reported from committees are referred to one of three calendars in the House. The Union Calendar is a calendar of the Committee of the Whole House on the state of the Union, to which is referred bills raising revenue, general appropriation bills, and bills of a public character directly or indirectly appropriating money or property.[169] Because this was the calendar occupying most of the House's remaining time in the 101st Session, it was strategically placed for call up when the opportunity presented itself.[170]

A House rule requires that all bills and joint resolutions be read three times.[171] The purpose of three readings of the bill is to provide members every opportunity to become familiar with the measures they are considering to enact.[172] Seldom are bills read verbatim as readings routinely are waived by unanimous consent.[173] The first reading occurs when the bill is first introduced and later referred to committee. The second reading occurs in the Committee of the

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[165]During the hectic closing weeks of the lOlst Congress (Oct. 1990), deadlocked with the executive branch over the federal budget, several pieces of Operation Desert Shield-related legislation (though subjectively not germane to one another), were combined into bills already moving through the legislative process. Omnibus bills (collections of smaller bills), are common during the last few weeks of a session of Congress as devices to pass numerous pieces of legislation, especially under suspension of rules procedures.

[166]H.R. Rep. No. 5814, lOlst Cong., 2d Sess. (1990).

[167]Interview with William Brew, staff member and SSCRA bill manager, U.S. Senate Veterans Affairs Comm. (Dec. 11, 1990).

[168]H.R. Rep. No. 5814, lOlst Cong., 2d Sess. (1990).

[169]Jefferson's Manual and the Rules and Practice of the House of Representatives, lOlst Cong., William Holmes, Rule XIII, at 492 (1988)[hereinafter Jefferson's Manual].

[170]136 Cong. Rec. H9591-9594 (daily ed. Oct. 15, 1990).

[171]Jefferson's Manual, *supra* note 169, rule XXI, at 587.

[172]W. Oleszek, Congressional Procedures and the Policy Process 152 (1989).

[173]*Id.*

Whole into which the House reverts when considering legislative amendments.[174] The last reading, consisting only of the bill's title, is performed just prior to the vote on final passage.[175]

On October 13th under a suspension of the rules motion, the bill was called to the floor of the House for action.[176] Routinely, once the House transforms itself into Committee of the Whole, amendments and debate are conducted concerning a particular bill. The House Rules Committee customarily issues a rule on the bill that sets out how many and what types of amendments may be offered and considered. The rule also will indicate how much time is set aside for debate, traditionally divided equally between the majority and minority parties.[177] Members routinely are limited to five minutes debate.'[178]

With little time left in a Congress, such a deliberate process is waived under a special procedure referred to as suspension of the rules.[179] This is a legislative vehicle used to short circuit lengthy rules formulation, Committee of the Whole amending, and debate procedures.'**Under House Rule XXVII, a two-third's majority vote is needed to suspend the regular procedures.[181] Under this process no amendments are permitted unless they have been provided for in the suspension motion, and debate is limited to forty minutes evenly divided between opponents and proponents.[182] After the forty minutes of debate has expired, a vote is taken on the suspension motion.[183] The vote on the motion to suspend the rules is simultaneously a vote to pass the bill for which suspension is requested.[184] If the two-third's vote to suspend the rules is achieved, the bill itself is passed.[185]

On October 15, 1990, under the suspended rules procedure, the House passed the remaining amendments to the Soldiers' and Sailors' Civil Relief Act.[186] They were passed by voice vote verbatim as the

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[174] *Id.*
[175] *Id.*
[176] *Id.* at 152-61.
[177] *Id.*
[178] *Id.*
[179] Jefferson's Manual, *supra* note 169, Rule XXVII.
[180] *Id.*
[181] *Id.*
[182] *Id.*, rule XXVII(3).
[183] *Id.*
[184] W. Oleszek, *supra* note 172.
[185] *Id.*
[186] 136 Cong. Rec. H9591-9594 (daily ed. Oct. 15, 1990).

House Veterans' Committee had reported them.[187] The next stop was the Senate, which had elected to wait and act on the House bill rather than initiate its own version.

The House bill was next reviewed by the Senate Veterans' Affairs Committee, which was uncomfortable with the section 201 appearance language contained in the bill'sstay of proceedings.[188] With only a few days left in the session, the Veterans' Affairs Committee elected to delete the appearance provision from the bill, preferring to address the issue in greater depth during the next Congress.[189]

This left only section 300's $1200 eviction rent ceiling provision out of the original four DOD proposals in the SSCRA package. The problem now facing the Senate Veterans' Affairs Committee was that the proposed Senate bill did not read exactly like the previously passed House SSCRA bill. As a result, the bill now required either a House-Senate Conference Committee or acquiescence on the House's part as to the Senate'sbill with a straight up or down vote (without date or amendment) on its passage when the Senate bill arrived in the House. Coordination was made with the House Veterans' Affairs Committee as to the latter proposition, and consent was obtained so they would support the Senate bill.[190]

Even with all this background planning, the SSCRA bill still had to pass the Senate. The Senate Veterans' Affairs Committee incorporated most of the House bill in a Senate SSCRA bill.[191] The committee staff, however, objected to the House'sSection 200 appearance amendment and deleted it from the Senate bill because it was considered too broad.[192]

While the Senate SSCRA bill was awaiting a floor vote, a highly controversial dispute broke out on the floor, led by Senator Alan K. Simpson (R-Wyoming)concerning another bill involving proposed inclusion of benefits for Agent Orange victims in an Omnibus Veterans' Benefits bill.[193] Senator Simpson opposed that inclusion and used precious closing minutes of floor time to voice his concerns against Agent Orange benefits.[194] While all this was going on, a parallel SSCRA

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[187] *Id.*
[188] Interview with William Brew. *supra* note 167.
[189] *Id.*
[190] *Id.*
[191] *Id.*; S. 3248. Soldiers' and Sailors' Civil Relief **Act** Amendments of 1990.
[192] *Id.*
[193] *Id.*
[194] *Hill Dispute* ***Killed*** *Vets' Benefit Bill,* Wash. Post, Oct. ***30.*** 1990. at A19.

bill containing identical SSCRA language to that in the Senate bill was prepared in the House. Representative Ted Weiss (D-New York), an advocate for Agent Orange benefits, objected to deleting Agent Orange Benefits from the Omnibus Veterans' Benefits bill.[195] While each side was waiting for the other to blink, Congress adjourned, killing bills in both chambers involving the eviction rent ceiling and extension of powers of attorney for service members missing in action.[196]

VII. CONCLUSION

Some have observed that a camel was a horse built by a committee. The journey of the SSCRA amendments may appear analogous. Having started their trek from the individual services to the Joint Service Task Force, to OSD and then to OMB, to the Council on Economic Advisers and back to OSD, and then on to the House Veterans' Affairs Committee to the House floor, and then to the Senate Veterans' Affairs Committee, and finally stalemated on the floor of the Senate, some may view the legislative and administrative process as a glass half empty instead of one half full.

Actually, the better perspective is to appreciate the nature of the law-making process as a deliberative process, not one designed or readily given to quality work under severe time and election constraints. The proposed SSCRA amendments began their legislative journey as a consequence of Operation Desert Shield and the call up of 50,000 Reserve component personnel after August 25th. They failed to be enacted when Congress adjourned October 27, 1990, two months later. What is truly remarkable is that they made it as far as they did in a complex legislative and political process in only two months when, from the many bills introduced, few ever make it to enactment, and those that do take at least twelve to twenty-four months.

Lest the effort be evaluated solely in terms of points on the scoreboard, a major accomplishment of the joint-service endeavor was the knowledge gained concerning the intricate process of drafting and moving important legislation, and the increased awareness of the issues involved. Thousands of officials in the executive and legislative branches have become interested in, and knowledgeable about, the strengths and weaknesses of the Soldiers' and Sailors' Civil Relief Act.

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[195] *Id.*
[196] *Id.*

The groundwork has been laid, the issues crystallized, and the proponents organized because of the 1990 experience. Undaunted and determined to renew the legislative fight, Armed Service legal assistance and congressional liaison staff met on November 7th to map a new strategy to greet the 102d Congress in January 1991 with a new SSCRA amendment package. As Operations Desert Shield and Desert Storm continue in the forefront of public and congressional attention, yet another window of opportunity will open to achieve the protections so greatly needed by those who answer the nation's call to arms. Congress in the past has wisely discerned the need to protect those who go about the nation's most important business from the vagaries of daily tribulations back home. With the tremendous concern Operations Desert Shield and Desert Storm have generated, Congress shows every indication it will provide the necessary refinishing of the SSCRA armor so necessary for those who go in harm's way on behalf of others.[197]

> So I'm here, proudly serving as part of Operation Desert Shield. I train for war, I ask God for peace and I hope America will remain behind me.[198]

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[197] The author is indebted to Colonel Gregory O. Varo, Chief, Army Legal Assistance 1988-1989; Lieutenant Colonel Donald L. Hansen, Chief, Army Legal Assistance 1989-present; and Majors Bernard P. Ingold and James P. Pottorff, Faculty, The Judge Advocate General's School, for their personal support in the writing, review, and editing of this article.

[198] Asarey, *Soldiers' Morale in Saudi Remains High,* Army Times, Dec. 3, 1990, at 22

WHEN JOHNNY (JOANNY) COMES MARCHING HOME: JOB SECURITY FOR THE RETURNING SERVICE MEMBER UNDER THE VETERANS' REEMPLOYMENT RIGHTS ACT

By Major Bernard P. Ingold' and Captain M. Lynn Dunlap**

I. INTRODUCTION

The activation of reserve and National Guard units during Operations Desert Shield and Desert Storm caused thousands of men and women to leave established civilian employment to serve their country. While the call to active duty entailed personal hardships and some economic losses that cannot be restored, these service members will not have to worry about returning to the jobs they left behind, thanks to the Veterans' Reemployment Rights Act (VRRA)!

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[1]38 U.S.C. § 2021 (1988). A comprehensive discussion of this law and case law interpreting it is contained in the U.S. Department of Labor, *Veterans' Reemployment Rights Handbook* (1988) [hereinafter VRR Handbook]. *See also* 29 Annotation, *Re-Employment of Veterans*, 29 A.L.R.2d 1279 (1953).

The VRRA, enacted originally in 1940 as part of the Universal Military Training and Service Act,[2] and most recently amended in 1991,[3] provides job protection for reservists and National Guard members who leave full-time employment to enter active duty. The legislation also preserves the job rights of reservists and members of the National Guard who enter active duty to perform inactive duty for training and active duty for training. In addition to mandating reemployment, the VRRA contains provisions designed to ensure that veterans do not lose important job rights, benefits, and privileges by serving in the armed forces.

This article examines the scope and application of the VRRA and the criteria that must be met to qualify for reemployment rights.[4] It will describe the Act's major benefits, including protection from discharge without cause upon return to employment, preservation of status and seniority, and the prohibition against discriminating against employees who have military obligations. The article will set forth the statutory and judicially created defenses available to employers who deny reemployment rights. Finally, the article will discuss how service members can enforce their rights under the Act and will review the basic remedies available to those who have been denied benefits wrongly.

The VRRA sets out separate criteria and job protections for those who volunteer for or are inducted into the armed forces,[5] those who

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[2]The original reemployment rights was extended by the Selective Service Act of 1948 to persons entering the military service after June 24, 1948. Pub. L. No. 80-759, 62 Stat. 604 (1948). This Act originally was intended to terminate in 1950 but was extended in 1950 and in 1951 under the Universal Military Training and Service Act. Pub. L. No. 82-51, 65 Stat. 75 (1951). The Act was renamed again in 1971 under the Military Selective Service Act, The reemployment provisions of the Military Selective Service Act were recodified in 1974 in the Vietnam Veterans' Readjustment Act of 1974. Pub. L. No. 93-508, 88 Stat. 1578 (1974). Since 1974, there have been several technical amendments to the Act. Armed Forces—Selective Service-Active Duty Order. Pub. L. No. 94-286, 88 Stat. 1598 (1976); Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94-502, 90 Stat. 2045 (1976); Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, 94 Stat. 2207 (1980); Department of Defense Authorization Act of 1983, Pub. L. No. 97-2.52, 96 Stat. 759 (1982). For a discussion of the early legislative developments affecting the Act, see Annotation, *supra* note 1, at 1284 n.1.

[3]The Soldiers' and Sailors' Civil Relief Act Amendments of 1991, H.R. 555, 102d Cong., 1st Sess., 137 Cong. Rec. S2615-05 (1991). The last major revision of the Act took place in 1986. ***See*** Recognition of National Guard and Reserve Act, Pub. L. No. 99-290, 100 Stat. 413 (1986); Veterans' Benefits Improvement and Health Care Authorization Act of 1986, Pub. L. No. 99-576, 100 Stat. 3279 (1986). In 1967, the Act was renamed the Military Selective Service Act of 1967.

[4]The authors wish to express their appreciation for the invaluable assistance of Mr. Sam Wright (USNR, CDR), Department of Labor, and Major Austin Smith (USMC), The National Committee for Employer Support of the Guard and Reserve.

[5]This category of service members is provided for in 38 U.S.C. § 2021 (1988).

leave employment to perform inactive duty for training and active duty for training,[6] and those who enter active duty pursuant to presidential call up.[7] Although this article will discuss these differing criteria, the reader must recognize that status of the individual greatly affects job benefits and employer obligations.

The reader also should be aware that various proposals to modify the VRRA recently have been introduced into Congress. One proposal submitted by the Department of Labor, entitled the Uniform Services Employment Rights Act of 1991, may completely revamp the present statutory framework.[8]

11. SCOPE OF THE VRRA

The primary purpose of the VRRA is to preserve for veterans, upon their return from service, the employment status they occupied prior to entering active duty. Congress intended that persons called to serve in the armed forces should resume their former positions without loss of employment, job status, or work privileges. By providing a one-year period during which a veteran cannot be discharged without cause, the Act further protects the veteran from arbitrary dismissal.

The Supreme Court has stated that the rights provided under the Act are "to be liberally construed for the benefit of those who . . . serve their country."[9] Virtually all lower courts have agreed and apply the Act to benefit the veteran. Only one very early reported case involving the VRRA expressed the view that, because the Act was in derogation of common law, it should be construed strictly.[10]

The VRRA applies to all federal, state, and local governments, and to all private employers, regardless of the number of employees.[11] To be covered by the Act, the veteran must have been an employee at the time he or she entered military service. Virtually all types of employees, including professionals, are entitled to job protection

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[6]These service members are covered under 38 U.S.C. § 2024 (1988).

The VRRA did not specifically address this category of service members prior to 1991. The 1991 Act generally provides that service members called to active duty under 10 U.S.C. § 673b will fall under section 2024.

[8]The Uniformed Services Employment Rights Act of 1991 was forwarded by the Department of Labor to the 102d Congress in March 1991.

[9]Fishgold Drydock & Repair Corp., 328 U.S. 275, 285 (1946).

[10]Wright v. Weaver Bros., 56 F. Supp. 595 (D. Md. 1944).

[11]38 U.S.C. §§ 2021(a), 2022 (1988). The law was amended in 1974 to apply to state and local governments. This extension of coverage was not intended to be retroactive to persons leaving active duty prior to the date of enactment of the amendmrnt, December 3, 1974.

under the VRRA. Reemployment benefits have been denied, however, to corporate officials[12] and elected union officers.[13]

A number of cases have concluded that independent contractors do not fall within the employer-employee relationship contemplated under the VRRA.[14] Courts consider all the facts and circumstances in determining whether an individual is an employee or an independent contractor, and give great weight to factors revealing supervision, direction, or control on the part of an employer.

The VRRA protects employees who have either voluntarily or involuntarily left civilian employment to enter active duty.[15] The VRRA also applies to those who have reenlisted into the military service.[16]

Service members, including reservists and National Guard members, are not required to request a leave of absence before departing for active duty, except for those personnel ordered to report to active duty for training (ACDUTRA), inactive duty training, or full-time training or full-time duty in the National Guard.[17] Section 2024(d) of the Act mandates that leave for reserve duty "shall upon request be granted."[18] This provision operates as a notice requirement and was not intended to give employers the right to refuse requests for absence.[19] Employees who resigned or were discharged prior to entry onto active duty are not entitled to reemployment protection under the Act.[20]

The most litigated issue involving the VRRA in recent years has been whether a section 2024(d) request for leave to perform active duty for training or inactive duty for training is subject to a stan-

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[12]Trusteed Funds v. Dacey, 160 F.2d 413 (1st Cir. 1947); Hastings v. Reynolds Metals Co., 75 F. Supp. 300 (N.D. Ill. 1947).

[13]Mouell v. Local No. 7635 U.M.W., 81 F. Supp. 151 (S.D. W. Va. 1948).

[14]Plomb Tool Co., v. Sanger, 193 F.2d 260 (9th Cir. 1951), ***cert. denied,*** 343 U.S. 919; King v. Southwestern Greyhound Lines, 169 F.2d 497 (10th Cir. 1948), *cert.* ***denied,*** 335 U.S. 891; Brown v. Luster, 185 F.2d 181 (9th Cir. 1947); Rosenbaum v. Ceco Steel Prod. Corp., 84 F. Supp. 954 (D.D.C. 1947).

[15]Courts consistently have held that the Act protects those who entered the military voluntarily. ***See,*** *e.g.*, Boston & Maine R.R. Co. v. Hayes, 160 F.2d 325 (1st Cir. 1947): Rudisill v. Chesapeake & O. R. Co., 167 F.2d 175 (4th Cir. 1948).

[16]White v. Boston & M. R. Co., 79 F. Supp. 85 (D. Mass. 1948).

[17]38 U.S.C. § 2024(d) (1988). This section provides, in pertinent part, that an employee "shall upon request be granted a leave of absence by [his] employer for the period required to perform active duty for training. . . in the Armed Forces of the United States. Full-time National Guard training is considered active duty for training. ***Id.*** § 2024(f).

[18]*Id.*

[19]*See, e.g.*, Troy v. City of Hampton, 766 F.2d 1000 (4th Cir. 1985), ***cert. denied,*** 474 U.S. 864 (1985).

[20]Edwards v. Capital Airlines, 176 F.2d 755 (D.C. Cir. 1949). ***cert. denied.*** 338 U.S. 885; Carney v. Boston & M.R. Co. 82 F. Supp. 366 (D. Mass: 1949).

dard of reasonableness.[21] In light of the national significance of this issue and its different application among the circuits, the Supreme Court recently granted certiorari in *King* v. *St. Vincent's Hospital*,[22] a case presenting this question. In *King*, a thirty-five-year member of the Alabama National Guard was selected for the position of Command Sergeant Major for the Alabama Guard. He advised his employer, St. Vincent's Hospital, that he would be leaving his position as the manager of a security department for three years to fill the Guard position.[23] Although the Guard member believed he was entitled to reemployment rights, his employer denied the leave request because it was unreasonably long. The Eleventh Circuit upheld a trial court ruling that a three-year request for a leave of absence was per se unreasonable.

Several circuit courts also have suggested that section 2024(d) requests for leave of absence are subject to an adequate notice requirement.[24] Under this view, an employer may require advance notice of impending leave and may deny requests if adequate notice has not been provided.

Courts are not in agreement about whether section 2024(d) requests for leave are subject to a reasonableness test. Several courts, including the Fourth Circuit in *Kolkhorst v. Tilghman*,[25] have held that section 2024(d) does not permit employers to consider the reasonableness of a request for a leave of absence.[26] In *Kolkhorst* the court concluded that an employer's policy of establishing an upper limit on the number of employees serving in the reserves violated section 2024.[27] The court noted that "[t]he reasonableness standards that have been imposed by other courts are contrary to the purpose of section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers."[28]

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[21] *See, e.g.*, Gulf States Paper Corp., v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). Most of the litigation involving the reasonableness test has focused on the duration of the leave request. According to at least one court, however, the length of the leave is only one of several factors courts should consider in determining reasonableness. *See* Eidukonis v. Southeastern Penn. Transp. Auth., 873 F.2d 688 (3d Cir. 1989).

[22] 901 F.2d 1068 (11th Cir. 1990), *cert. granted,* 111 S. Ct. 950 (1991).

[23] The Guard member in *King* was ordered to full-time duty under 32 U.S.C. § 502(f).

[24] Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988); Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988).

[25] 897 F.2d 1282 (1990), *petition for cert. filed,* No. 89-1949.

[26] *Id.*; Cronin v. Police Department, 675 F. Supp. 847 (S.D.N.Y. 1987).

[27] The court also concluded that the employer's action violated the anti-discrimination provision of 38 U.S.C. § 2021(b)(3).

[28] *Kolkhorst*, 897 F.2d at 1286.

The conclusion reached by the court in *Kolkhorst* regarding section 2024(d) is correct. If leaves of absence under section 2024(d) are subject to standards of reasonableness and adequate notice, employers will apply their own subjective limits on an otherwise unconditional statute. These indeterminate and vague limitations on the Act's unequivocal standards impermissibly limit its intended protections and frustrate our national defense interests by providing a disincentive to serving in reserve positions for a significant length of time. The Supreme Court should reverse the circuit court decision in *King* and require courts to adhere to the unqualified terms of the VRRA.

Congress has helped remove a small measure of uncertainty in this area by enacting legislation in February 1991 clarifying that reservists and National Guard members called to active duty by the President will be protected during the entire period of active service without limitation.[29] Reservists and National Guard members leaving employment for scheduled active duty for training, inactive duty for training, and full-time Guard duty under the Active Duty Guard/Reserve Program (AGR), however, remain subject to the notice requirement of section 2024(d).[30]

III. CONDITIONS FOR REEMPLOYMENT

Five eligibility criteria must be satisfied before a returning service member will be entitled to reemployment. The basic requirements are that the individual held a nontemporary position, left that position to enter active duty, served on active duty for less than four years, honorably performed military service, and requested reinstatement within ninety days of discharge or hospitalization continuing after discharge due to military service. Most courts have placed the burden of establishing these criteria on the veteran.[31]

A. LEFT A NON-TEMPORARY POSITION

The job protection afforded the Act applies only if the veteran or reservist left an "other than temporary position" prior to entry on

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[29] *See supra* note 3.

[30] Section 2024(f) specifically states that "full-time training or other full-time duty performed by a member of the National Guard under section . . . 502 . . . of title 32 is considered active duty for training." Thus, full-time Guard duty is "active duty for training" under section 2024(d). *See* England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 Mil. L. Rev. 1 (1984) (explanation of the personnel classification scheme for those in the AGR program).

[31] *See, e.g.*, Shadle v. Superwood Corp., 858 F.2d 437 (8th Cir. 1988); Trulson v. Trane Co., 738 F.2d 770 (7th Cir. 1984).

active duty.[32] The test used by most courts to determine whether a position was temporary is whether the reservist had a reasonable expectation that employment would be continuous for an indefinite time.[33]

The ''other than temporary position" requirement was examined recently by the Sixth Circuit in *Stevens v. Tennessee Valley Authorities*.[34] In *Stevens* a member of the Tennessee National Guard was employed by the Tennessee Valley Authority (TVA) to work on a specific project and had no assurances of further employment after completion of the project. Upon returning from active duty, the TVA refused to reemploy the service member because his employment was temporary.

The court rejected the TVA's position, concluding "that the fact that a returning veteran's employment would have foreseeably come to an end at sometime in the future, does not, by itself, exclude the veteran from enforcing the right to reemployment granted by the Act.''[35] The court held that the appropriate test for determining whether a position is "other than temporary" is whether the veteran, prior to entering the military service, had a reasonable expectation in light of all the facts and circumstances of his employment that his employment would continue for a significant or indefinite period. The *Stevens* court further provided that even seasonal employment could constitute "other than temporary position" if the veteran held a reasonable expectation of reemployment on a regular basis.

Most courts have followed *Stevens* in liberally construing the "other than temporary" job requirement. Thus, for example, probationary employees[36] and employees under employment-at-will contracts[37] have received job reemployment protection. Moreover, the fact that a reservist was working under a contract of limited duration does not necessarily mean that the job was temporary.[38]

Despite the favorable interpretation of the term "other than temporary" offered by the court in *Stevens*, however, some courts have denied reemployment rights to seasonal employees.[39]

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[32]38 U.S.C. § 2021(a) (1988).

[33]*See, e.g.*, Moe v. Eastern Airlines, 246 F.2d 215 (5th Cir. 1957), ***cert.*** *denied*, 357 U.S. 936, *reh'g* ***denied,*** 358 U.S. 858.

[34]687 F.2d 158 (6th Cir. 1982).

[35]*Id.* at 162.

[36]Collin v. Weirton Steel Co., 398 F.2d 305 (3d Cir. 1968).

[37]Cox v. Int'l Longshoreman's Assoc., 343 F. Supp. 1291 (N.D. Tex. 1972).

"Martin v. Roosevelt Hosp., 426 F.2d 155 (2d Cir. 1970); Williams v. Walnut Park Plaza, 68 F. Supp. 957 (E.D. Pa. 1946).

[39]*See, e.g.*, Akers v. Amett, 597 F. Supp. 557 (S.D. Tex. 1983), *aff'd*, 748 F.2d 283 (5th Cir. 1984); United States v. North American Creameries, Inc., 70 F. Supp. 36 (D.N.D. 1947). *But cf.* Bochterle v. Albert Robbins, Inc., 165 F.2d 942 (3d Cir. 1947).

B. LEFT EMPLOYMENT FOR THE PURPOSE OF ENTERING ACTIVE DUTY

The VRRA applies only if an individual left civilian employment "to perform military service."[40] In a leading case discussing this requirement, *Trulson v. Trane*,[41] the employee, Trulson, was on the verge of being terminated because of unexcused absences when he advised his employer that he intended to enter the military service. Trulson did not return for work and was terminated two weeks later. Trulson signed an enlistment contract one month later and entered active duty several weeks after that.

The court held that Trulson left employment primarily to avoid being terminated and subsequently entered the military to secure reemployment rights. The court opined that this conduct was not protected by the statute, reasoning that "[j]ust as an employer may not defeat the intent of the statute by discharging a man because he is going into the armed forces, an employee should not be allowed to contravene Congressional intent by quitting just after his employer has decided to fire him for cause. . . ."[42]

C. SERVED ON ACTIVE DUTY FOR LESS THAN FOUR YEARS

Congress did not intend to place an unreasonable administrative and economic burden on employers and therefore limited reemployment rights to those veterans who serve on active duty for less than four years.[43]

The four-year limitation has several exceptions. A veteran *involuntarily* extended on active duty beyond four years will not lose the protection.[44] Moreover, this period can be extended for up to five years for an enlistee if the period of extension beyond four years is at the request and convenience of the government.[45]

The four-year period consists only of time spent serving on active duty in the military. It does not include, for example, time that accrued while the employee was laid off or was waiting to be

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[40] 38 U.S.C. § 2021(a) (1988).
[41] 738 F.2d 770 (7th Cir. 1984).
[42] *Id.* at 775-76.
[43] 38 U.S.C. §§ 2024(a), 2024(b) (1988).
[44] *Id.* § 2024(a) (applying to voluntary enlistees); *Id.* § 2024(b)(1) (applying to members of the Reserve component called to active duty).
[45] *Id.* § 2024(a).

reemployed. Moreover, time serving on active duty for training or initial active duty for training does not count toward the four-year limitation.[46] Time served on active duty under section 673b presidential call up authority also does not apply to the four-year period.

The four-year period is cumulative and requires the addition of all active duty time even if there were breaks in active service. The four-year limitation, however, applies only with regard to the same employer.[47]

D. PERFORMED MILITARY SERVICE HONORABLY

Veterans must satisfactorily have performed military service to be entitled to the benefits of the VRRA.[48] Returning veterans who have not been released from active duty under honorable conditions will not be entitled to reemployment rights.[49]

Several types of discharges clearly fail to meet the honorable conditions requirements. These include punitive discharges imposed by courts-martial, dismissals received by commissioned officers as a result of courts-martial, and other than honorable discharges issued by administrative boards.[50]

The possibility that returning veterans with less than honorable discharges can secure rights under the Act by seeking an administrative upgrade is limited. Under current Department of Labor guidance, an upgrade will entitle the veteran to protection under the VRRA only if the upgrade is retroactive and the veteran satisfied the other eligibility criteria.[51]

Discharges characterized as honorable or "honorable, under general conditions'' clearly meet the honorable discharge require-

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[46] *Id.* § 2024(d). Unlike section 2021, which covers active duty, section 2024 pertaining to requests for leave of absence to perform active duty for training and inactive duty for training does not contain a limitation on the length of service.

[47] Hall v. Chicago & E. Ill. R.R. Co., 240 F. Supp. 797 (N.D. Ill. 1964).

[48] The VRRA applies the honorable conditions requirement in three separate provisions. 38 U.S.C. § 2021(a)(1988), requires persons inducted into the military to receive "a certificate described in Section 9(a) of the Military Selective Service Act." 38 U.S.C. § 2024(a)(1988), requires enlistees to be released under "honorable conditions." 38 U.S.C. § 2024(b)(1)(1988), requires reservists called to active duty to be released under ''honorable conditions."

[49] Browning v. General Motors Corp., 387 E Supp. 985 (S.D. Ohio 1974)(concluding that an "other than honorable" administrative discharge fails to qualify a returning veteran for reemployment rights).

[50] *Id.*

[51] VRR Handbook, page 6-2.

ment of the VRRA. The Department of Labor also has taken the position that entry level discharges issued after less than 180 days of service qualify as under honorable conditions and entitle the recipient to reemployment rights.[52]

In some cases, a veteran or an employer may take issue with the services' characterization of the quality of service. Both employees and employers, however, are bound by the services' characterization. Accordingly, an employer may not refuse to reemploy a veteran who possesses an honorable discharge certificate by claiming that the military improperly characterized the quality of service.[53]

E. APPLY FOR REEMPLOYMENT WITHIN STATUTORY TIME PERIOD

The VRRA sets forth a requirement to apply for reemployment within a specified time period. This statutory time period could be ninety days, thirty-one days, or the next regularly scheduled work shift, depending on the type of military service performed and the authorization for the service.

Inductees and veterans leaving active duty must apply to their civilian employer within ninety days of their termination of active duty.[54] Veterans who have been hospitalized because of injuries incurred while on active duty must reapply within ninety days after discharge from the hospital or one year after release from active duty, whichever is earlier.

For reservists and National Guard members returning from an initial period of active duty for training of twelve consecutive weeks or less, the application period is thirty-one days.[55] Reservists and National Guard members returning from other types of military training, such as inactive duty for training or active duty for training, must report back to work for the next regularly scheduled work period.[56]

The VRRA previously failed to address the length of time a returning reservist had to request reemployment if called up pursuant to section 673b of chapter 10, Presidential Selected Reserve Authorization. Congress recently closed this gap by enacting legislation that

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[52] *Id.*

[53] Hall v. Chicago & E. Ill. R.R. Co., **240** F. Supp. 797 (N.D. Ill. 1964).

[54] 38 U.S.C. § 2021(a) (1988).

[55] *Id.* § 2024(c). The 31-day period is extended if the Reserve or Guard member is hospitalized due to injuries sustained while on active duty. The service member must reapply within 31 days of discharge from hospitalization or one year after leaving active duty. whichever is less.

[56] *Id.* § 2024(g).

provides that reservists and National Guard members called to active duty under section 673b have up to thirty-one days after release to apply for reemployment.[57] Accordingly, reservists and National Guard members called up to serve in Operations Desert Shield and Desert Storm have at least thirty-one days to apply for job reinstatement. As a result of a presidential action, however, this period could be extended to ninety days for those service members serving on active duty in support of these operations on or after 18 January 1991.[58]

Regardless of the statutory time limits, returning veterans should apply for reemployment as soon as possible after release from active duty. A veteran may apply for reemployment rights before being released from active duty.[59]

No specific form is required to apply for reemployment. Veterans should inform employers that they have left military service under honorable conditions and are seeking a return to their former position. Although not required, veterans should apply in writing to establish a record of the date and fact of reapplication and to prevent misunderstandings. Veterans should inform employers of their current military status, the fact that they are a former employee, and that they desire reemployment.

Courts have held that the veteran has the burden of proving that an application was made within the statutory time limit and some courts have denied reemployment benefits under the Act when a conflict in evidence on the issue exists.[60] Courts should apply an objective standard that takes into consideration whether a reasonable employer would consider that an employee had applied for reinstatement under all the facts and circumstances. Courts have denied benefits to veterans who merely made casual inquiries about their former positions or the availability of jobs.[61] On the other hand, a recent case held that a veteran's failure to state expressly that he was a former employee and was seeking reemployment may be excused when he appeared at the former place of employment within ninety days and the employer was aware that the veteran left employment to enter the military.[62]

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[57] 10 U.S.C. § 673(b) (1988).

[58] Exec. Order No. 12,743, 56 Fed. Reg. 2661 (1991). This Executive Order invoked the authority vested in the President under section 673 of chap. 10 to order the Ready Reserve to active duty.

[59] Martin v. Roosevelt Hosp., 426 F.2d 155 (2d Cir. 1970).

[60] Lacek v. Peoples Laundry, 94 F. Supp. 399 (M.D. Pa. 1950); Hayse v. Tenn. Dep't of Conserv., 750 F.2d 298 (E.D. Tenn. 1989).

[61] Hayse v. Tenn. Dep't of Conserv., 750 F.2d 298 (E.D. Tenn. 1989); Shadle v. Superwood Corp., 858 F.2d 437 (8th Cir. 1988); Baron v. United States Steel *Corp.*, 649 F. Supp. 537 (N.D. Ind. 1986). *But cf.* Borseth v. Lansing, 61 N.W.2d 132 (Mich. 1953) (inquiry about reinstatement held sufficient to constitute application).

[62] Thomas v. City and Borough of Juneau, 638 F. Supp. 303 (D. Alaska 1986).

IV. EMPLOYER DEFENSES TO REEMPLOYMENT

A. UNREASONABLE TO REEMPLOY

Employer compliance with the reemployment provisions of the VRRA is not required under all circumstances. Even if all five of the criteria have been met, employers may avoid liability for failure to reemploy returning veterans if it would be unreasonable under all of the facts and circumstances to do so.[63] The purpose of this defense is to protect the employer from creating useless jobs for returning reservists. The private employer carries the burden of proving that circumstances have made it unreasonable to reemploy the veteran.[64]

This defense requires more than a mere showing that it would be inconvenient or undesirable to reinstate the returning reservist.[65] The determination of whether it would be unreasonable to reemploy a veteran must be made on the basis of all the facts and circumstances.[66]

Barisoff v. Hollywood Baseball Association[67] provides a good example of when this defense should apply. In *Barisoff* returning veterans sought reemployment with a baseball club after several years in the service. The employer convinced the court that it would be unreasonable to reemploy the aging ballplayers because standards in the league had increased in their absence and it was impossible for them to meet the new standards.

Most of the litigation concerning this defense has focused on employers' economic difficulties in reemploying a returning veteran. The generally prevailing view is that a decline in business is not sufficient to deny reemployment.[68] Several courts, however, have concluded that adverse economic circumstances are a legitimate basis for an employer to deny reemployment.[69]

In several cases, courts have accepted this defense when substantial changes have taken place in the employer's organization. For ex-

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[63]38 U.S.C. § 2021(a) (1988).

[64]Watkins Motor Line Inc. v. De Galliford, 167 F.2d 274 (5th Cir. 1948).

[65]Levine v. Berman, 161 F.2d 386 (7th Cir. 1947), *cert. denied,* 332 U.S. 792; Smith v. Lestershire Spool & Mfg. Co., 86 F. Supp. 703 (N.D.N.Y. 1949).

[66]Featerstone v. Jersey Central Power & Light Co., 161 F.2d 1000 (3d Cir. 1947).

[67]71 F. Supp. 493 (S.D. Cal. 1947), *aff'd,* 166 F.2d 1023 (9th Cir.).

[68]Van Doren v. Van Doren Laundry Service, 162 F.2d 1007 (3d Cir. 1947); **Allyn** v. Abad, 167 F.2d 901 (3d Cir. 1948).

[69]Rusterholtz v. Titeflex Inc., 166 F.2d **335** (3d Cir. 1948): Maloney v. Chicago B & Q. R.R. Co., 72 F. Supp. 124 (W.D. Mo. 1947).

ample, in *Gallant* v. *Segal*,[70] an employer stopped doing business as a corporation after the veteran departed for military service. In doing business as an individual, the employer no longer needed a sales manager—the position the veteran had filled prior to entering active duty. The court found that it would be unreasonable for the employer to create a new and useless job, and absolved the employer from reinstating the veteran.

Not every change in employment organization will relieve employers from their obligations under the VRRA. The reemployment rights under the Act, for example, specifically apply to preservice employers' ''successors in interest.''[71] Although no definition of ''successor in interest" is present in the VRRA, courts define it to include circumstances in which there is a substantial continuity of operations using essentially the same facilities and work force.[72]

B. VETERAN UNQUALIFIED FOR REEMPLOYMENT

To enjoy reemployment rights under the VRRA, returning veterans must be qualified to perform the duties of the position to which they seek to return.[73] Generally, courts will presume that a veteran is qualified to assume a former position.[74] Accordingly, the employer bears the burden of showing that a veteran is not qualified.[75]

This defense should not be accepted merely because a returning veteran must adapt to changes that have been made in the work place since the veteran departed. Moreover, an employer may not assert this defense if the grounds for disqualification existed prior to entry on active duty and were not communicated to the veteran.[76]

The VRRA contains special rules that apply when a veteran is not qualified to perform because of an injury incurred while performing military service. The law obligates the employer to offer disabled

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[70]74 F. Supp. 78 (D.N.H. 1947).

[71]38 U.S.C. § 2021(a)(B)(i) (1988).

[72]Chaltry v. Ollie'sIdea, Inc. 546 F. Supp. 44 (W.D. Mich. 1982); Leib v. Georgia-Pacific Corp., 925 F.2d 240 (8th Cir. 1991).

[73]Bryan v. Griffin, 166 F.2d 748 (6th Cir. 1948).

[74]McCoy v. Olin Mathieson Chemical Corp., 360 F. Supp. 1336 (S.D. Ill. 1973).

[75]Duey v. City of Eufaula, Alabama, 102 LRRM 2896 (M.D. Ala. 1979).

[76]Anderson v. Schouweiler, 63 F. Supp. 802 (D. Idaho 1945). ***But see*** John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir. 1947) (error for court to exclude evidence that veteran drank heavily in former position with company).

returning veterans substitute employment that provides "like seniority, status, and pay or the nearest approximation consistent with the circumstances."[77]

C. CONSTITUTIONAL DEFENSES

Several employers have sought to avoid fulfilling obligations under the VRRA by attacking the statute on constitutional grounds. These attacks have not met with success in the courts.

In *Carney v. Cummins Engine Company*[78] the returning veteran was not given an opportunity to work overtime because of a loss of seniority caused by his entry in military service. The employer argued that an award of back pay to the veteran constituted a taking for a public purpose without compensation in violation of the fifth amendment. The court rejected this argument, noting that the employer could either permit the employee to work overtime or pay for unworked time.

In ***Peel*** *v. Florida Department of Transportation*[79] the state of Florida argued that the VRRA violated both the tenth and eleventh amendment. Florida claimed that the tenth amendment reserved to the state all powers not delegated to the federal government. Accordingly, because Congress was not specifically empowered to determine the reemployment rights of veterans in state agencies, this right was reserved to the states. Moreover, Florida maintained that the eleventh amendment prohibited suits by citizens against states without the state's permission.

The Fifth Circuit rejected the state's tenth amendment argument by holding that providing reemployment rights to veterans is a legitimate exercise of Congress's power to raise armies. The court also had little difficulty in rejecting the state's eleventh amendment claim, finding that Congress explicitly abrogated state immunity by enacting the VRRA. The court concluded that "[b]oth the relief of lost wages and benefits, and the reinstatement of [the veteran] are appropriate forms of relief authorized by Congress."[80]

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[77] 38 U.S.C. § 2021(a)(B)(ii) (1988). Substantially the same provision applies to those disabled while on inactive duty for training and active duty for training. *See id.* § 2024(d), (c). Cases involving rights of returning disabled veterans include Hembret v. Georgia Power Co., 637 F.2d 423 (5th Cir.); and Ryan v. City of Philadelphia, 559 F. Supp. 783 (E.D. Pa. 1983), *aff'd without opinion*, 732 F.2d 147 (3d Cir. 1984).

[78] 602 F.2d 763 (7th Cir. 1979).

[79] 600 F.2d 1070 (5th Cir. 1979).

[80] *Id.* at 1082; *see also* Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir. 1979).

D. WAIVER

Employers have asserted in several cases that veterans have waived their rights under the VRRA. Courts traditionally have been very reluctant to find that a veteran has waived rights under the VRRA. The most frequently litigated waiver cases involve preservice contracts signed by the employee that afford less reemployment protection than that contained in the VRRA. For example, in *Humbree v. Georgia Power Company*[81] a union contract provided the veteran with less rights than the VRRA provides. The court determined that the collective bargaining agreement could not take precedence over the VRRA and was enforceable only after the statutory rights had been provided.[82]

The court in *United States v. New England Teamsters and Trucking*[83] reached a similar result in a case involving a union contract that provided less benefits than the VRRA. The court rejected the assertion that the veteran waived his statutory rights merely by voting to become a member of the union pension plan. The court insisted on evidence showing a clear and unequivocal indication of an intention to waive rights before it would deprive a veteran of statutory rights. The holdings in these cases are consistent with a long line of precedent establishing that a private agreement or collective bargaining agreement cannot authorize denial of rights under the Act.[84]

Waiver issues have arisen in several other contexts as well. Courts consistently have held that veterans do not waive their rights under the Act by demanding higher positions than they are entitled to[85] or by accepting alternative employment after their applications for reinstatement have been denied.[86]

While cases finding waiver are rare, veterans can waive their rights under the Act by contract. A waiver is enforceable if the veteran was fully aware of his or her rights under the Act and if the language of waiver is clear and unambiguous.[87]

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[81] 637 F.2d 423 (5th Cir. 1981).

[82] The court in Bunnel v. New England Teamster in Trucking Industry, 655 F.2d 451 (1st Cir. 1981), reached a similar result.

[83] 737 F.2d 1274 (2d Cir. 1984).

[84] *See, e.g.*, Coffy v. Republican Steel Corp., 447 U.S. 191 (1980); Alabama Power Co. v. Davis, 431 U.S. 581 (1977); Accardi v. Pennsylvania R.R., 353 U.S. 225 (1966)

[85] Trusteed Funds, Inc. v. Dacey, 160 F.2d 413 (1st Cir. 1947).

[86] Leob v. Kivo, 169 F.2d 346 (2d Cir. 1948), *cert. denied*, 335 U.S. 891 (19491.

[87] United States v. New England Teamsters and Trucking, Inc., 737 F.2d 1274 (2d Cir. 1984); Niemic v. Seattle Ranier Baseball Club, Inc. 67 F. Supp. 705 (W.D. Wash. 1946).

Furthermore, the waiver of VRRA rights must be knowing and voluntary before it will be enforced by the courts. In *Loeb v. Kivo*[88] an employer misrepresented to a returning veteran that it had no obligation to rehire him because of changed business conditions. The employer convinced the veteran to give up his former sales job and work for lower wages than he received prior to entering the service. The court held that, under these circumstances, the veteran had not knowingly waived his statutory rights.

V. BENEFITS UNDER THE VRRA

A. *REINSTATEMENT*

If an application is made within the prescribed time limit and all the other criteria are met, the employer must reinstate the returning veteran to his or her former position or to a position "of like seniority, status, and pay."[89] The employer's obligation may be to reinstate the veteran to a higher position than the one vacated if the employee would have advanced to the position had there been no interruption for military service.[90] In these cases, however, the returning employee must demonstrate that it is reasonably certain they would have advanced to that position.

The veteran returning from active duty service is entitled to reinstatement within a reasonable time, and the employer bears the burden of demonstrating the reasonableness of any delays.[91] Reservists and National Guard personnel returning from inactive duty for training or active duty for training are entitled to prompt reinstatement if they report back to work at the "beginning of the next regularly scheduled working period."[92]

A veteran is entitled to reinstatement even if another person has been hired to fill the position while the veteran was in the service.[93] If more than one veteran attempts to claim the same position, the Act limits the employer's obligation by providing that the veteran who left the position first has priority reemployment rights.[94]

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[88]169 F.2d 346 (2d Cir. 1947), *cert. denied*, 335 U.S. 891 (1948).

[89]38 U.S.C § 2021(a)(2)(A)(i), (B)(i) (1988). ***See*** *generally* Alabama Power Co. v. Davis. 431 U.S. 581 (1977).

[90]Tilton v. P. R. Co.. 376 U.S. 181 (1964);Thomas v. Pacific Northwest Bell Tel. Co., 434 F. Supp. 741 (D. Or. 1977).

[91]Bury v. General Motors Corp., 476 F. Supp. 1262 (N.D. Ohio 1979);Witter v. Pennsylvania National Guard, **462** F. Supp. 299 (E.D. Pa. 1978).

[92]38 U.S.C. § 2024(d) (1988).

[93]Davis v. Halifax City School Sys., 608 F. Supp. 966 (E.D. N.C. 1981).

[94]38 U.S.C. § 2026 (1988).

Courts consistently have held that an employer cannot avoid reinstatement simply because no opening currently exists for the returning veteran.[95] Courts have reached this result even in cases where reinstatement will impose a hardship on the employer. For example, in *Fitz* v. *Board of Education of the Port Huron Area Schools*[96] a school district was required to reemploy a returning teacher even though he returned in the middle of the school year and his former position already had been filled.

Probationary employees who enter active duty prior to completion of probationary periods also are entitled to reinstatement if it is reasonably foreseeable that they would have attained permanent status.[97] Probationary employees must satisfactorily complete probationary requirements upon their return to employment,

B. SENIORITY AND STATUS

Upon returning to the work place, the returning service member must be restored without loss of seniority or other job benefits.[98] In computing seniority and entitlement to other job benefits, veterans are to be treated as though they had been employed continuously during the period of active service.[99] This concept, referred to as the "escalator principle," means that all of the employee's rights, including all "perquisites of seniority," move forward as if employment was not interrupted.[100] Courts have applied this escalator concept to a number of employment-related benefits, such as promotions, pay raises, vacation pay, severance pay, and retirement benefits.

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[95] *See, e.g.*, Goggin v. Lincoln St. Louis, **702** F.2d **698** (8th Cir. **1983);** Anthony v. Basic American Foods, Inc., **600** F. Supp. **352** (N.D. Cal. **1984);** Green v. Oktibbeha County Hosp., **526** F. Supp. **49** (N.D. Miss. **1981).**

[96] 662 F. Supp. **1011** (E.D. Mich. 1985), *aff'd*, **802** F.2d **457 (6th** Cir. **1986).**

[97] Tilton v. Missouri P.R. Co., **376** U.S **169 (1964);** Brickner v. Johnson Motors, **425** F.2d **75** (7th Cir. **1970).**

[98] 38 U.S.C. § 2021(a)(A)(ii) **(1988).** Reserve component members returning from active duty for training also are entitled to such seniority as if they had not been absent during military service. *See* Reilly v. New England Teamsters and Trucking Industry Pension Fund, **737** F.2d **1274** (2d Cir. **1984).**

[99] This "escalator principle" was established in Fishgold v. Sullivan Drydock & Repair Corp., **328** U.S. **275 (1946).** This principle was later incorporated into the statute. *See* **38** U.S.C. § 2021(b)(1) **(1988);** *see also* Accardi v. Pennsylvania R.R. Co., **369** F.2d **805** (2d Cir. **1966).**

[100] Alabama Power Co. v. Davis, **431** U.S. **581 (1977).** The "escalator principle" is the subject of at least three law review articles: Silver, *Operation of the "Escalator Clause" in Fringe Benefit* Cases, **60** Minn. L. Rev. **45 (1973);** Haggart, *Veterans' Re-employment Rights and the "Escalator Principle",* **51** Boston U. L. Rev. **539 (1971);** Ross, *Returning Veterans' Rights To Fringe Benefits After Foster v. Dravo Corporation,* **68** Mil. L. Rev. **55 (1975).**

A two-prong analysis should be used to determine whether a job benefit constitutes a "perquisite of employment" and thereby accrues to a returning service member:

> First, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service. Second, the nature of the benefit must be a reward for length of service rather than a form of short-term compensation for services rendered.[101]

Virtually every court to consider the issue has concluded that pension and retirement plans are perquisites of seniority.[102] Accordingly, employers must make contributions and grant vesting on the returning employee's behalf. Courts will fashion a remedy to compensate a veteran fully if an employer wrongfully refuses to issue constructive credit toward a pension plan for time spent on active duty.[103]

Another benefit that accrues to a returning veteran is the receipt of all pay increases that stem from continuous association with an employer.[104] A returning employee is not, however, entitled to receive actual compensation lost while serving on active duty.

The Supreme Court in *McKinney* v. *Missouri-Kansas Railway Co.*[105] held that this provision also entitles a returning veteran to any and all promotions that depend on continuity of service or seniority. On the other hand, a returning employee is not entitled to a promotion that is purely discretionary with the employer.[106]

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[101] Goggin v. Lincoln St. Louis, 702 F.2d 698, 701 (8th Cir. 1983). This approach is based on two Supreme Court cases: Alabama Power Co. v. Davis, 431 U.S. 581 (1977) (creating the "perquisite of seniority" test); and Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 (1966) (developing the "reasonable certainty" test).

[102] Alabama Power Co. v. Davis, 431 U.S. 581 (1977); Reilly v. New England Teamsters and Trucking Indus. Pension Fund, 737 F.2d 1274 (2d Cir. 1984); Litwicki v. Pittsburgh Paint, 505 F.2d 189 (1974); Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975); Gall v. United States Steel Corp., 598 F. Supp. 769 (W.D. Pa. 1984); Letson v. Liberty Mutual Ins. Co., 523 F. Supp. 1221 (N.D. Ga. 1981); Beckley v. Tipi-Rothway Corp., 448 F. Supp. 563 (N.D.N.Y. 1978).

[103] Bunnell v. New England Teamster and Trucking Industry Pension Fund, 655 F.2d 451 (1st Cir. 1981).

[104] Lang v. Great Falls School Dist., 842 F.2d 1046 (9th Cir. 1988); Hatton v. Tabard Press Corp., 406 F.2d 593 (2d Cir. 1969); Nichols v. Kansas City Power & Light Co., 391 F. Supp. 833 (W.D. Mo. 1975). The term pay is broader than salaries, commissions, and hourly rates and includes such items as traveling expenses, drawing accounts, bonuses, and shift premiums. VRR Handbook, at 12-1.

[105] 357 U.S. 265 (1958).

[106] Batayola v. Mun. of Metro. Seattle, 798 F.2d 355 (9th Cir. 1986), ***cert. denied,*** 482 U.S. 914 (1987); Thomas V. Pacific Northwest Bell Tele. Co., 434 F. Supp. 741 (D. Or. 1977).

A frequently litigated issue is whether the returning veteran is entitled to have the amount of time in service included in the computation of vacation benefits. Most courts, including the Supreme Court, have taken the view that vacation pay benefits are forms of short-term compensation, do not fall within the term "other benefits," and therefore are not protected.[107] Under this view, employers are not required to grant returning veterans vacation pay that accrued during the period of active service, but are required to increase the rate at which vacation pay is earned prospectively. A small number of courts have held, however, that vacation rights are benefits protected under the Act.[108]

Other fringe benefits, such as severance pay, job transfers, sick pay, and supplemental unemployment benefits are protected seniority rights under the Act if they were intended to accrue automatically as a function of continued association with the employer and were not forms of short-term compensation.[109] Courts generally have viewed profit-sharing plans[110] and sick pay[111] as forms of short-term compensation that are not protected under the Act. The Supreme Court in *Coffy* v. *Republic* ***Steel Corporation***[112] reached a contrary conclusion with regard to supplemental unemployment benefits (SUB), finding that it was a protected reward for lengthy service.

The escalator usually works to the advantage of the returning veteran, but it may have an opposite effect. For example, the VRRA does not offer protection to a returning veteran if the employer can show that a veteran would have been laid off had he been continuously employed.[113] The veteran, however, would be entitled to any severance pay benefits that would have accrued had employment not been interrupted by military service.[114]

The VRRA specifically provides that returning veterans should not be denied any other "incident or advantage of employment''[115] and

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[107]Foster v. Dravo Cor., 420 U.S. 92 (1975); ***see*** *also* Lipani **v.** Bohak Corp. 546 F.2d 487 (2d Cir. 1976); Morton v. Gulf M. & O.R. Co., 405 F.2d 415 (8th Cir. 1969).

[108]MacLaughlin v. Union Switch & Signal Co., 166 F.2d 46 (3d Cir. 1948); Woods **v.** Glen Alden Coal Co., 73 F. Supp. 871 (M.D. Pa. 1947).

[109]Jackson v. Beech Aircraft Co., 517 F.2d 1322 (10th Cir. 1975) (retirement pay); Lipani **v.** Bohack Corp., 546 F.2d 487 (2d Cir. 1976) (sick pay); Almond v. United States Steel Corp., 499 F. Supp. 786 (E.D. Pa. 1980) (promotability).

[110]Raypole v. Chemmi-Trol Chemical Co., Inc., 754 F.2d 169 (6th Cir. 1985).

[111]Lipani v. Bohack Corp., 546 F.2d 487 (2d Cir. 1976).

[112] 383 U.S. 225 (1966).

[113]Fishgold **v.** Sullivan Drydock and Repair Corp., 328 U.S. 275 (1946).

[114]Derepkowski **v.** Smith-Lee Co., Inc. 371 F. Supp. 1071 (E.D. Wis. 1974).

[115]38 U.S.C. § 2021(b)(3) (1988). The phrase "incident or advantage of employment" is not defined in the Act.

must be considered as having been on furlough or leave of absence during the period of active service for purposes of qualifying for other benefits.[116] These benefits are in addition to benefits available under the escalator principle and must be accorded to a returning veteran even though they are not perquisites of seniority.[117]

A troubling issue facing some reservists called to active duty during Operation Desert Shield is whether a civilian employer is obligated to maintain health insurance coverage during periods of military service. The VRRA addresses this issue briefly by providing that employees leaving for active duty shall be entitled to participate in insurance ''pursuant to established rules and practices relating to employees on furlough or leave of absence.''[118]

If an employer's medical insurance plan offers extended coverage during an employee's leave of absence, that plan should continue to provide primary coverage. If the period of coverage for employees on extended leave is exceeded by the length of military service, the Consolidated Omnibus Reconciliation Budget Act of 1986(COBRA)[119] requires certain employers to offer the reservist and his or her dependents the opportunity to elect continued coverage.[120] Generally, COBRA allows termination of extended coverage upon eligibility for coverage under another group plan. For purposes of COBRA, however, the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS) is not considered a qualifying group health care plan.[121] The Internal Revenue Service concluded that employers cannot terminate health care coverage merely because a reservist has entered active duty and is eligible for coverage under a military service health care plan such as CHAMPUS.[122]

Another issue in the health care area concerns the ability of the employer to deny health care coverage to any returning veteran or family member for a condition that arose during the period of active service. A recent amendment to the VRRA clarifies that employer-offered health care must be extended to returning veterans and

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[116] *Id.* § 2021(b)(1).

[117] Nichols v. Kansas City Power & Light Co., 391 F. Supp. 833 (W.D. Mo. 1976).

[118] 38 U.S.C. § 2021(b)(1) (1988).

[119] 29 U.S.C. § 1161 (1988); 26 U.S.C. § 4980B (1988).

[120] COBRA requires that a reservist and his or her dependents be offered an opportunity to elect continued coverage upon a qualifying event. The reduction of work hours caused by entry on active duty is a qualifying event under COBRA 26 U.S.C § 4980B(f)(2)(B)(iv) (1988).

[121] *Id.* §§ 4980B(g)(2), 5000(b)(1).

[122] Internal Revenue Service Notice 90-58, 1990-40 I.R.B. 1.

other persons entitled to participate without exclusions for preexisting conditions and without fulfilling any waiting periods.[123] The only exception to this mandated entitlement is if the preexisting condition was service-connected.

C. PROTECTION FROM DISCHARGE

Congress appropriately concluded that a right to reemployment does not offer full protection to a returning employee. Veterans often need time to regain proficiency and learn new skills to adapt to changes in the work place. Moreover, unscrupulous employers could circumvent the Act easily by reinstating veterans and then terminating employment without justification after a short period.

For these reasons, the VRRA protects returning veterans from discharge without cause from their positions for up to one year after restoration.[124] Reservists and National Guard personnel returning from initial active duty for training are protected from discharge without cause for six months.[125] Reservists and members of the National Guard performing active duty under presidential call up authority provided for in section 673b have discharge protection for up to six months.

The period of immunity for separation without just cause begins to run only after the veteran has been reemployed.[126] The employer bears the burden of establishing the existence of just cause if the employee is terminated within the statutory protection period.[127]

The leading case on the question of what constitutes "just cause" is *Kesserich* v. *Carnegie-Illinois Steel Corp.*[128] In *Kesserich* the court concluded that the statutory language is to be defined as that cause for discharge that a fair-minded person might act upon. If discharge was based upon reasons other than mere excuses or arbitrary action taken to avoid the statute, then discharge is for "cause." Another court has defined the standard "without cause" as referring to the absence of any legal ground for dismissal such as lack of skill, competence, diligence, or loyalty.[129]

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[123] *See supra* note 3.
[124] 38 U.S.C. § 2021(b)(1) (1988).
[125] *Id.* § 2024(c).
[126] O'Mara v. Peterson Sand & Gravel Co., Inc., 498 F.2d 896 (7th Cir. 1974).
[127] Carter v. United Sates, 407 F.2d 1238 (D.C. Cir. 1968); Henry v. Anderson County Tenn. Office of Sheriff, 522 F. Supp. 1112 (E.D. Tenn. 1981).
[128] 163 F.2d 889 (7th Cir. 1947).
[129] Hoyer v. United Dressed Beef Co., 67 F. Supp. 730 (S.D. Cal. 1946); *see also* McCormick v. Carnett-Partsnett Systems, Inc., 396 E **Supp.** 251 (M.D. Fla. 1975).

While the one-year period ensures that a veteran's reemployment right is not illusory, the veteran must perform satisfactorily upon returning to the job. Clearly, the commission of offenses such as theft or forgery constitutes just cause for dismissal. Just cause for termination within the one-year period has been found to exist for intoxication, insubordination, frequent unexplained absences, profanity, and rudeness to customers.[130] Inefficiency, neglectful performance of duties, and incompetence are also grounds for discharge.[131]

D. DISCRIMINATION AGAINST RESERVE COMPONENT SERVICE MEMBERS

In 1986, Congress formally recognized the essential role played by members of the National Guard and Reserve components in national defense and expressed its view that these employees require and deserve the support and cooperation of civilian employers.[132] Congress amended the VRRA to increase substantially federal job rights of members of the Reserve components.[133] This amendment provides that any person holding a position with a federal, state, or private employer may not be denied retention, promotion, or any other incident or advantage of employment because of any obligation as a member of a Reserve component.[134] Moreover, members of the Reserve components seeking employment with any employer may not be subjected to job discrimination for being a member of the Reserve components.

Because this legislation is relatively new, there are few reported cases directly involving discrimination in hiring or retention of a member of the Reserve components. The Fourth Circuit recently concluded, however, that an employer's policy of establishing a limit to the number of employees who could be reservists violated the anti-discrimination provision of 2021(b)(3).[135]

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[130]For a list of cases and a discussion of dismissal for cause, see Annotation, *What is "Cause" Justifying Discharge From Employment of* **Returning** *Servicemen Re-employed Under § 9 of the Military Selective Service Act of* 1967, 9 **ALR** Fed. 225.

[131]Larsen v. Air California, 313 F. Supp. 218 (C.D. Cal. 1970); Koons **v.** Lebanon Steel Foundry, 92 F. Supp. 914 (M.D. Pa. 1950); Sundra v. St. Louis American Baseball Club, 87 F. Supp. 471 (E.D. Mo. 1949).

[132]Recognition of the National Guard and Reserve, Pub. L. No. 99-290, 100 Stat, 413 (1986).

[133]Pub. L. No. 99-576, 100 Stat. 3279 (1986).

[134]38 U.S.C. § 2024 (1988).

[135]Kolkhorst v. Tilghman, 897 F.2d 1282 **(4th** Cir. 1990). *petition for cert. pending*, No. 89-1949.

A number of reported cases have involved the propriety of discharging a reservist-employee.[136] Employers involved in these cases typically assert several reasons other than, or in addition to, military affiliation for the termination. In these mixed motive cases, it may be necessary for the Reserve component member to establish that the member's military obligations were the sole reason for the termination.[137] Once the employee has presented evidence that the discharge was motivated because of military obligations, the burden should shift to the employer to show good cause.[138] In addition to protection from discharge, this provision also protects reservists from being demoted because of military affiliation.[139]

The VRRA also protects Reserve component members from discrimination on promotions and ''anyother incident of employment.''[140] The Supreme Court adopted a narrow construction of this provision, holding that it does not require an employer to rearrange an employee's work week in order to fulfill military obligations and yet be paid for the same number of hours that he would have received without military obligations.[141] On the other hand, a court has ruled that this provision requires paying a reservist for a holiday that fell within the period of military service because other employees on leave were paid for the holiday.[142] Another court has held that an employer may not require a Reserve component member to use earned vacation time for military training.[143] This anti-discrimination provision also precludes an employer from changing job duties and work schedule because of an employee's reserve obligations.[144]

VI. ENFORCING RIGHTS UNDER THE VRRA

Not all employers will respect the rights of returning service members. Injured returning veterans have the statutory right to assistance from the federal government and may file suit in federal court with the assistance a United States Attorney.

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[136]Fann v. Modlin, 687 F. Supp. 218 (D.N.D. 1988); Weber v. Logan County Home for the Aged, 623 F. Supp. 711 (D.N.D. 1985), *aff'd*, 804 F.2d 1058 (8th Cir. 1986); Micalone v. Long Island R.R. Co., 582 F. Supp. 973 (S.D.N.Y. 1983).

[137]Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988).

[138]Weber v. Logan County Home for the Aged, 623 F. Supp. 711 (D.N.D. 1985), *aff'd*, 804 F.2d 1058 (8th Cir. 1986).

[139]Henry v. Anderson County, Tenn. Office of Sheriff, 522 F. Supp. 1112 (E.D. Tenn. 1981).

[140]38 U.S.C. § 2021(b)(3) (1988).

[141]Monroe v. Standard Oil Co., 452 U.S. 549 (1981).

[142]Waltermeyer v. Aluminum Co. of America, 804 F.2d 821 (3d Cir. 1986).

[143]Almond v. United States Steel Gorp., 499 F. Supp. 786 (E.D. Pa. 1980).

[144]Carlson v. New Hampshire Dep't of Safety, 609 F.2d 1024 (1st Cir. 1979).

The Department of Labor is the federal agency assigned responsibility for helping service members pursue VRRA reemployment rights with private, state government, and local government employers.[145] Veterans experiencing problems with these employers should first contact any office of the Veterans' Employment and Training Office, U.S. Department of Labor.[146] The Office of Personnel Management is responsible for enforcing the VRRA if the employer is the federal government.[147]

Returning veterans who are denied reemployment or who are not receiving benefits also may receive assistance from the Ombudsman for the National Committee for Employer Support of the Guard and Reserve.[148] Veterans may obtain information and assistance from the nearest Department of Veterans' Affairs office.

Most reemployment cases are resolved satisfactorily through negotiations between the employer and the Department of Labor. If a nonfederal case cannot be settled and the Office of the United States Attorney determines that an employer wrongfully denied reemployment benefits under the Act, the United States Attorney must file suit against the employer in the United States district court for any district in which the employer maintains a place of business.[149] The court must expedite hearing on the matter and cannot assess fees or court costs against any person applying for benefits.[150]

The VRRA specifically provides that no statute of limitations shall apply for seeking judicial enforcement of the Act.[151] To prevent injustice to employers, however, courts have applied the equitable doctrine of laches to bar claims if the employer can show unreasonable

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[145] 38 U.S.C. § 2025 (1988).

[146] The Veterans' Employment and Training Service (VETS), U.S. Department of Labor, is responsible for enforcing the Act. The national VETS telephone number is (202) 523-8611.

[147] The Office of Personnel Management is statutorily assigned to enforce the VRRA against the Executive Department of the federal government. 38 U.S.C. § 2023(a) (1988). The role of assisting veterans in cases against the federal government has been transferred in some cases, however, to the Merit Systems Protection Board. Veterans working for the federal government should contact the nearest Office of Personnel Management (OPM) regional office or a Federal Job Information Center for assistance in receiving VRRA benefits. Legislation pending before Congress proposes to change this area by directing the Department of Labor to provide assistance to veterans having trouble obtaining reemployment rights from a federal agency.

[148] The committee has established a nationwide toll-free number to assist members of the Reserve and National Guard: 1-800-336-4590.

[149] 38 U.S.C. § 2022 (1988).

[150] *Id.*

[151] *Id.*

delay and prejudice.[152] Laches should be applied sparingly, however, in light of the purposes of the Act. Courts have held that it is impermissible to refer to a statute of limitation for guidance in determining what is reasonable in light of the express absence of a statute of limitations in the Act.[153]

VII. REMEDIES

The VRRA gives courts the power to compensate injured service members for loss of wages or benefits.[154] Veterans who are wrongly denied reemployment are entitled to damages for compensation from the date of application for reinstatement.[155]

Courts generally have agreed that a veteran has a duty to mitigate damages by seeking alternative employment. A veteran need not, however, accept jobs that are not comparable to the position that has been improperly denied.[156] Once the employee has established the amount of lost wages, the burden of establishing a failure to mitigate shifts to the employer.[157]

In computing the amount of back pay to award, courts generally will give credit for wages received by veterans in other employment.[158] Courts should not, however, consider unemployment compensation in reducing the amount of a back pay award.[159]

In some cases, a veteran actually may earn more during certain pay periods in a new position than he or she would have earned in the job that was denied. The excess earned during these periods should not, according to the view of one court,[160] be used to offset other periods in which the veteran received less than he otherwise

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[152] *See, ag.*, Farries v. Stanadyne/Chicago Div., 832 F.2d 374 (7th Cir. 1987)(eight years); Donner v. Levine, 232 F.2d 185(2d Cir. 1956)(delay of three years); Leonick v. Jones & Laughlin Steel Corp., 258 F.2d 48 (2d Cir. 1948) (delay of ten years).

[153] Stevens v. Tennessee Valley Auth., 712 F.2d 1047 (6th Cir. 1983); Goodman v. McDonnel Douglas Corp., 606 F.2d 800 (8th Cir. 1979), ***cert.*** *denied,* 446 US. 913 (1980).

[154] 38 U.S.C. § 2022 (1988).

[155] *Id.*

[156] Thomas v. City and Borough of Juneau, 638 F. Supp. 303 (D. Alaska 1986).

[157] Hanna v. American Motors Corp., 742 F.2d 1300 (7th Cir. 1984), *cert.* ***denied,*** 467 U.S. 1241 (1984).

[158] Chernoff v. F'andick **Press** Inc., 440 F. Supp. 822 (S.D.N.Y. 1977); M.R.R. v. Bentubo, 160 F.2d 326 (1st Cir. 1947).

[159] *See* National Labor Relations Bd. v. Gullet Gin Co., 340 U.S. 361 (1951) (Supreme Court concluded that unemployment compensation should not be deducted from back pay awarded under the National Labor Relations **Act).**

[160] Dyer v. Hinky-Dinky, 710 F.2d 1348 (8th Cir. 1983).

would have received in the former position. This is a just approach, because to apply offset in these cases would penalize a veteran who earns additional compensation through initiative and hard work.

Veterans receiving back pay awards also should be entitled to prejudgment interest on the amount of the award.[161] In fact, at least one court has concluded that the failure to award prejudgment interest on a back pay award was an abuse of discretion.[162] Veterans should be entitled to interest notwithstanding good faith on the part of the employer or the fact that the reemployment issue raised was close.[163]

While the VRRA seeks to make an injured veteran whole, the statute lacks enough teeth to ensure that this goal is always met. The VRRA, unlike many other federal statutes affording rights to citizens, does not provide for payment of attorneys' fees and court costs. Accordingly, if the United States Attorney declines to bring suit, an injured veteran must assume the costs of retaining civilian counsel to bring suit to enforce provisions of the Act. To exacerbate the problem, the Act does not allow assessment of punitive penalties against employers who willfully violate the Act. Employers therefore have little incentive, except the obligation to pay interest on back pay awards, to grant rights mandated by the Act quickly and fully.

Returning veterans should not be placed in the position of paying to vindicate their rights under the Act. The statutory scheme and remedies available for enforcing VRRA rights should be strengthened by adding provisions for assessment of attorneys' fees, court costs, and punitive damages.

VIII. CONCLUSION

While not entirely free from criticism, the VRRA provides essential job protection to those who answer the call to serve. The VRRA recognizes the vital role Reserve and National Guard service members have in our national defense and fairly preserves for veterans the employment status they occupied at the time they left to perform military service.

For the most part, employers willingly have granted veterans the rights they are entitled to under the Act. When veterans have been

[161] Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981).
[162] Hanna v. American Motors Corp., 724 F.2d 1300 (7th Cir. 1984), *cert. denied,* 467 U.S. 1241 (1984).
[163] *Id.*

forced to litigate reemployment rights against employers, courts liberally have construed the VRRA, rejected attacks against its constitutionality, limited application of statutory defenses, and resisted attempts to curtail statutory protections.

In several areas, however, courts have eroded the benefits provided by the act. The "reasonable test" some courts have applied to requests for leave of absence to perform active duty for training and inactive duty for training impermissibly limits the unconditional rights provided under the VRRA. This disturbing development results in vague and differing standards of reasonableness and fairness and furnishes a significant disincentive to service in the Reserve and National Guard. The Supreme Court should take the opportunity provided by the *King* case to reaffirm the principle that courts are not free to qualify the unequivocal terms of a statute. Congress also should consider amending section 2024(d) to eliminate judicial interference in this area. Until these developments take place, members of the Reserve and Guard should provide adequate notice and otherwise be as reasonable as possible when requesting leaves of absence for military training.

Another area that should be modified is the confusing statutory scheme delineating the time periods required to apply for reemployment. It is asking too much to expect returning workers and employers to know what their obligations are when even lawyers practicing in this area have difficulty identifying the applicable time period.

Notwithstanding the various grace periods allowed by law, legislation modifying the current statutory scheme has been introduced into Congress. This legislation modifies the complex structure of the VRRA and bases rights and obligations solely on the length of service. Under the proposed legislation, service members returning from over 181 days of active service have ninety days to apply for their former position and will be protected from discharge without cause for up to one year. Those serving for more than thirty-one days but less than 181 days must reapply within thirty-one days and have six months' protection from discharge without cause. Service members serving less than thirty-one days must report to their former positions at the next regularly scheduled work period and will be protected from discharge without cause for three months. This proposed scheme is far superior to the present statutory format and should be enacted by Congress as soon as possible. Returning veterans should apply in writing for reinstatement as soon as possible. Veterans should refrain from signing documents waiving rights under the Act and

should refuse to accept employment offering less pay or seniority than their former position.

Congress should consider strengthening the remedies provision of the Act by allowing the assessment of attorneys' fees, court costs, and, in especially egregious cases, punitive damages. Although the law contains provisions mandating the involvement of the Department of Labor and the United States Attorney, these agencies are sometimes too understaffed and underfunded to pursue cases against employers. The provision of attorneys' fees is essential to enable veterans to secure competent legal counsel to pursue cases against employers who do not live up to their statutory commitment. Moreover, the possibility of punitive damages should deter employers from violating rights granted under the Act.

In other respects, the current statutory criteria for qualifying for reemployment rights strike a fair balance between the benefits owed to returning service members and the economic costs to employers. The requirements to serve honorably, make application within a specified time period, and serve less than four years of active duty ensure that only deserving veterans receive protection, and limit the economic costs and administrative burdens on employers.

The readiness and integrity of this nation's armed forces requires that service members perform their jobs free from economic insecurity. The VRRA is an essential step toward achieving this goal.

THE DURABLE POWER OF ATTORNEY: APPLICATIONS AND LIMITATIONS

by Major Michael N. Schmitt* and Captain Steven A. Hatfield**

I. INTRODUCTION

Durable powers of attorney have been receiving increased attention as the American public becomes more concerned with quality of life issues. These instruments are nothing more than variants of basic powers of attorney, with which most legal assistance officers are familiar. As with all powers of attorney, they serve to create an agency relationship[1] between the grantor of the power—the principal—and the grantee—his or her agent.[2] The power that is created is

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[1] 3 Am. Jur. 2d ***Agency*** *§* ***23*** (1962). In Smith v. United States, 113 F. Supp. 702 (D. Haw. 1953), the court noted, "A power of attorney creates an agency relationship, with the giver of the power remaining the legal owner of any property involved." ***Id.*** at 707.

[2] Though agency relationships may be created orally, most states require a power of attorney to be evidenced by a written instrument. When no such statutory requirement exists, however, an oral power of attorney may be created. ***See*** Brown v. Poulos, 411 N.E.2d 712 (Ind. Ct. App. 1980)(oral power of attorney recognized). Nevertheless, all powers of attorney should be in writing to ensure acceptance by third parties.

the right of the agent to "step into the principal's shoes" and act on the principal's behalf.[3]

At common law, any agency relationship automatically was terminated by the death or incapacity of the principal.[4] This rule was based on the premise that because the principal was no longer able to oversee the actions of his agent, a continued agency relationship was imprudent. Unfortunately, the termination of the relationship upon the incapacity of the principal had the effect of depriving the principal of his agent at the very time he was needed most—when the principal was no longer able to act.[5]

The durable power of attorney is designed to survive the incapacity of the principal. By its terms, it continues the agency relationship when, at common law, that relationship would be extinguished. This article will examine the durable power of attorney, concentrating on the uses to which it might be put by military members.

II. ORIGIN OF THE DURABLE POWER OF ATTORNEY

Traditionally, the only person who could act on behalf of an incapacitated individual was a conservator or guardian designated by court order.[6] Unfortunately, appointment involved cumbersome and expensive legal proceedings.[7] The drafters of the Uniform Probate Code (UPC) recognized the desirability of creating a functional and expedient alternative to this process. To that end, they suggested a statutory modification of the common law of agency, as it applied

[3]The agent's authority to act on behalf of the principal is not unrestricted, however. For instance, a power of attorney giving an agent the power to execute a will on behalf of the principal would be ineffective.

[4]3 Am. Jur. 2d **Agency** §§ 51, 55 (1962).

[5]This assertion has been made by numerous attorneys specializing in estate planning. **See,** *e.g.*, Collin, Lombard, Moses & Spitler, Drafting the Durable Power of Attorney—A Systems Approach (2d ed. 1989) [hereinafter Drafting].

[6]While the terms conservator and guardian are used interchangeably in this article, it should be remembered that in many states they are used to distinguish between one who has been appointed for a minor (guardian) and an individual appointed for all others (conservator). Likewise, the terms disability, incapacity, and incompetency will be used interchangeably, even though they technically refer to different conditions.

[7]Other undesirable aspects of court-appointed conservatorships include the public nature of the hearing, the delays inherent in such a court proceeding, and the ineffectiveness of managing an estate by such means. Bos, *The* ***Durable*** *Power of Attorney*, 64 Mich. B.J. 690, 690-91 (1985).

to powers of attorney, that would recognize the intent of the principal that the agency relationship survive incapacity or disability.[8]

With the promulgation of the Uniform Probate Code in 1969, the National Conference of Commissioners on Uniform State Laws introduced the concept of the durable power of attorney.[9] Ten years later, the provisions of the UPC dealing with the durable power of attorney were extracted verbatim from the UPC, modified, and published as the Uniform Durable Power of Attorney Act (UDPA).[10] Currently, all fifty states recognize some version of the durable power of attorney, having adopted either the UDPA, the UPC, or some variation of them. These "versions" of the durable power of attorney vary widely from state to state. This article will note some of the more significant differences; however, no attempt will be made to catalogue all variations.

As noted, the essence of the durable power of attorney is a modification of the common-law rule of revocation by operation of law upon incapacity of the principal." Two basic means are available to accomplish this purpose, both illustrated in the UPC's definition of a durable power of attorney:

> A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of

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[8]The prefatory note to the 1964 Model Special Power of Attorney for Small Property Interests Act (the forerunner of the 1969 Uniform Probate Code) states:

> The purpose of this model Special Power of Attorney Act is primarily to provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes are small, such as pensions or social security payments, and who, in anticipation or because of physical handicap or infirmity. . .wish to make provision for the care of their personal or property rights or own affairs. It is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizeable commercial property interests. Neither is it intended wholly to replace conservatorship or guardianship, but rather it is designed as a less expensive alternative.

Model Special Power of Attorney for Small Property Interests Act, prefatory note (National Conference of Commissioners on Uniform State Laws 1964), *reprinted in* Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Seventy-Third Year 175 (1964).

[9]Unif. Prob. Code § 501-1, 8 U.L.A. 513 (1989).

[10]Unif. Durable Power of Att'y Act, 8A U.L.A. 278 (1987).

[11]All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unif. Prob. Code § 5-502, 8 U.L.A. 514 (1989); Unif. Durable Power of Att'y Act § 2, 8A U.L.A. 280 (1987).

> the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity. . . .[12]

The phrase "shall not be affected" is used when the principal wishes to create an agency relationship that is effective immediately and will continue in effect throughout any subsequent disability. On the other hand, the principal may want to create a "springing" durable power of attorney by including the phrase "shall become effective upon" in the document. Springing powers of attorney only become effective—or "spring" into effect—upon the disability of the principal.[13] Although the statutory language is preferable, using "similar words showing the intent of the principal" to create the durable power of attorney will suffice.[14] Legal assistance attorneys should be aware that a few states, such as Texas and South Carolina, do not

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[12] Unif. Prob. Code § 5-501, 8 U.L.A. 513 (1989); Unif. Durable Power of Att'y Act § 1, 8A U.L.A. 278 (1987).

[13] A "springing" durable power of attorney should include a definition of what constitutes disability or incapacity. For example, section 5-401 of the Uniform Probate Code provides that "the person is unable to manage property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance. . . ." Unif. Prob. Code § 5-401, 8 U.L.A. 478 (1989).

A clause also should be included in the "springing" durable power of attorney requiring a physician to certify the principal's disability before the power of attorney becomes effective. A difficult problem for the principal may be determining how much he wants to defer to the physician's judgment. For example, in Alzheimer's disease a clinical continuum of seven stages is recognized. These stages range from no cognitive decline (when patients appear clinically normal) to very severe cognitive decline (when the patient clearly is incapacitated). Gouskos, *Providing Peace of Mind for the Elderly Patient*, 128 Tr. & Est. 45, 46 (1989) (citing Gottlieb and Riesberg, *Legal Issues in Alzheimer's Disease*, 3 Am. J. Alzheimer's Care & Res. 2, 28 (Mar-Apr. 1988)). Incapacity occurs somewhere between stages one and seven. The point on the continuum where incapacity is reached is obviously a judgment call and the judgment of physicians may differ. *Id.* As a result of these problems, many estate planners recommend that the power of attorney require two physicians to certify that disability has occurred. *See, e.g.*, Callahan, *The Use of a Convertible Trust in Planning for Disability*, 178 Tax L. & Est. Plan. Series (Estate and Financial Planning for the Aged and Incapacitated Client) 117, 122 (1988).

[14] *In re* Estate of Head, 615 P.2d 271 (N.M. Ct. App. 1980), was a case in which the words "without limitation" were used in the creation of a general power of attorney. The court held these words were similar enough to the statutory phraseology to show the intent of the principal to create a durable power of attorney. *Id.* at 276-77. Specific language is not required in Louisiana, either. La. Civ. Code Ann. art. 3027 (West Supp. 1990) points out that all powers of attorney in that state survive the incapacity of the principal. Clearly, the safer course is to use the statutory words of creation in any jurisdiction where they are provided.

statutorily recognize the "springing" power of attorney.[15] Thus, even before considering which type is most appropriate for the client, attorneys should determine whether the law in their jurisdiction allows both types of powers.

Because the durable power of attorney survives incapacity, the issue of revocation is raised. The common-law rule of agency—that a principal may revoke the authority of the agent at will—also applies to the durable power of attorney. Therefore, one who executes a durable power of attorney, whether immediate or "springing," retains the power to revoke it. Once the principal becomes incapacitated, however, revocation no longer is possible. The same incapacity that prevents the principal from acting on his own behalf will prevent him from revoking a previously executed durable power of attorney.[16] Clients should be cautioned about this limitation.

The durable power of attorney also modifies the common-law rule concerning termination upon the death of the principal. At common law, the death of the principal revoked the power of attorney, regardless of whether the attorney-in-fact or third parties had notice of the death.[17] This is not the case under section 5-504 of the UPC:

> The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.[18]

The UPC also provides that an affidavit of the attorney-in-fact stating that he did not have knowledge of the death of the principal

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[15] In states where the durable power of attorney statute does not authorize it to become effective upon the disability or incapacity of the principal, it should not be presumed that a "springing" durable power of attorney will be recognized. *S.C.* Code Ann. § 62-5-501(a) (Law. Co-op. 1987); Tex. Prob. Code Ann. § 36A (Vernon Supp. 1990).

[16] Moses & Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C.L. Rev. 511 (1979). Moses and Pope note that at the onset of incompetency a principal's contractual disability would prevent him from both entering and voiding contracts. They then cite South Carolina cases standing for the proposition that mental capacity is just as essential to the revocation of a will as to its creation. *Id.* at 523. Presumably, the same reasoning would apply to the attempted revocation of a durable power of attorney by an incapacitated principal.

[17] 3 Am. Jur. 2d *Agency* § 51 (1962).

[18] Unif. Prob. Code § 5-504, 8 U.L.A. 516 (1989); Unif. Durable Power of Att'y Act § 4, 8A U.L.A. 282 (1987).

at the time that he exercised the power of attorney is conclusive proof of the nonrevocation or nontermination of the power.[19] This change to the common law provides much-needed security to the agent, who is relieved of having to check the principal's condition before taking any action. In addition, it protects individuals with whom the agent is dealing by allowing them to place greater reliance on the agency relationship.

A final note is in order prior to turning to specific functions of the durable power of attorney. Although the creation of the durable power of attorney was meant as an alternative to the costly process of obtaining a court-appointed guardian, it has not completely supplanted the role of the guardian. This is evident in UPC section **5-503's** handling of the relationship between a "durable" attorney-in-fact and a court-appointed fiduciary:

> If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.[20]

Realizing that a court-appointed fiduciary can revoke the power of attorney, the principal may wish to include a clause in which he nominates an individual—presumably the attorney-in-fact—to serve as his guardian in case one is appointed. According to the UDPA. the intent of the principal in such a situation will be respected:

> A principal may nominate by a durable power of attorney, the conservator guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.[21]

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[19]Unif. Prob. Code § *5-505,* 8 U.L.A. 617 (1989); Unif. Durable Power of Att'y **Act** § 5, 8A **U.L.A.** 284 (1987).

[20]Unif. Prob. Code § 5-503(a), 8 U.L.A. 514 (1989); Unif. Durable Power of **Att'y** Act § 3(a), 8A U.L.A. 280 (1987).

[21]Unif. Prob. Code § 5-503(b), 8 U.L.A. 514 (1989); Unif. Durable Power of Att'y **Act** § 3(b), 8A **U.L.A.** 280 (1987).

One easily can imagine a situation in which this aspect of a durable power of attorney could become important. Conflicts of interest may arise between attorneys-in-fact and others with an interest in the estate or well-being of the principal. The other individuals could defeat the intent of the principal to have his attorney-in-fact act on his behalf by instituting protective proceedings, being appointed guardian, and then revoking the power of attorney. A clause in the power of attorney nominating the attorney-in-fact as guardian in the event of such proceedings could very well remove the incentive to initiate proceedings in the first place.[22]

III. USES OF THE DURABLE POWER OF ATTORNEY

The UDPA is silent on the scope of the application of a durable power of attorney. Obviously, any common-law restrictions on the powers delegable to an agent with a regular power of attorney will apply to the durable power of attorney. The general common-law rule is that an agent can perform all acts the principal may perform unless public policy or contractual agreement requires personal performance by the principal.[23] Any further restrictions on the uses to which a durable power of attorney may be put will be statutory in nature.[24]

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[22] J. Price, Contemporary Estate Planning (1983). According to Dean Price:

> The potential for conflict between the attorney in fact and the conservator is eliminated if the attorney in fact is also nominated in the durable power of attorney to serve as the principal's conservator or guardian. Such a nomination will discourage others from applying for appointment as conservator or guardian and will secure the authority of the attorney in fact against upset in the event it becomes necessary or desirable to appoint a conservator or guardian for the principal. It is often wise to designate one or more successor attorneys in fact lest the first-named person predecease the principal or otherwise be unable to act.

Id. at 215.

[23] 3 Am. Jur. 2d Agency § 20 (1962); Restatement (Second) of Agency § 17 (1958).

[24] For instance, the District of Columbia prohibits the execution or acknowledgment of deeds conveying real or personal estate by an agent. D.C. Code Ann. § 45-601 (1981). Florida does not limit the power of the agent, but does place restrictions on who may become an agent by providing that "[a] principal may create a durable family power of attorney designating his spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity, whether natural or adopted, as his attorney in fact by executing a power of attorney." Fla. Stat. Ann. § 709.08(1) (West Supp. 1990). Cal. Civ. Code § 2304-2326 (West 1985), deals with California's statutory restrictions on the authority of agents and is part of California's codification of its entire law of agency. Cal. Civ. Code § 2295-2513 (West 1985 & Supp. 1990). California's limitations on powers delegable in the realm of health care are listed *infra* at note 88.

Most states do not have any statutory prohibitions on the powers that can be exercised by attorneys-in-fact. When this is the case, courts may hold that the only powers that can not be delegated are those that are illegal or against public policy.[25] For example, it would be impermissible to convey the power to execute a will, contract a marriage, vote at public elections, or take an oath. Additionally, in most cases, personal service contracts are nondelegable. With this background in mind, we now turn to the two topics with which the vast majority of durable powers of attorney are concerned: property management and health care.

A. THE DURABLE POWER OF ATTORNEY FOR PROPERTY MANAGEMENT

Management of property has been the traditional reason that powers of attorney have been executed. Most military members are familiar with this use of the power of attorney, having executed one at some time in their career prior to a permanent change of station (PCS), temporary duty (TDY), or deployment. Whether to sell a car, close on a home, or sign a lease, many clients require these on a regular basis.

Despite the wide use of the standard power of attorney in military practice, the many applications of the durable power are all too often overlooked.[26] Because property management for an incompetent is more complex than for an individual who simply is not physically

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[25] Gilman, *Planning* for *Disability*, 35 Prac. Law 57, 61 (1989). After noting the relative paucity of case law in this area, Gilman cites the cases of Brewington v. Brewington, 313 S.E.2d 53 (S.C. Ct. App. 1984), and *In Re* Estate of Shriver, 441 So. 2d 1105 (Fla. Dist. Ct. App. 1983). *Id.* In *Brewington* the court affirmed the power of an agent possessing a durable power of attorney to institute proceedings in the principal's name for legal separation from her spouse and to seek related equitable relief. The court distinguished an action for legal separation from an action for divorce, leaving it unclear whether the attorney in fact would have the power to sue for divorce. *Brewington*, 313 S.E.2d at **55.** In ***Shriver*** the issue was whether the attorney in fact had the power to make a binding election on behalf of the principal to take a statutory elective share of the principal's deceased husband's estate. The court held the power to be valid. *Shriver*, 441 So. 2d at 1108.

[26] For an interesting suggestion concerning the "springing" power introduced by the UDPA, see Meyer, *Continuing Powers of Attorney: A Military* ***Use,*** 112 Mil. L. Rev. 257 (1986). Captain Meyer proposes a regular power of attorney that would become effective not upon incapacity, but upon deployment or other short notice assignment. He notes that no statutory authorization exists for such a contingent power of attorney, but argues that those states allowing "springing" durable powers of attorney that become effective upon incapacity of the principal should certainly recognize the validity of a power of attorney that was contingent upon the happening of some event short of the principal's incapacity. *Id.* at 270-71.

present, a comprehensive legal assistance program must involve advance preparation for the possibility of disability. Therefore, legal assistance attorneys must be as familiar with drafting a durable power of attorney as a nondurable one.

Because durable powers can vest virtually the same powers in an agent as a basic power of attorney, the client may be tempted simply to execute a general durable power of attorney. Although this document would grant the agent all powers authorized by law in case of disability, doing so would be imprudent. Instead, all durable powers of attorney should either be limited, or, if general in scope, at least should set forth any foreseeable specific powers the principal wishes to delegate.

As with the nondurable power of attorney, a third party generally is not obligated to honor the durable power of attorney. This makes having the document prepared so that it will convince the third party to deal with the agent absolutely essential. As commentators have noted, third parties often hesitate to deal with an agent unless the particular type of transaction being engaged in is set forth clearly in the power of attorney. This problem is exacerbated in the case of a durable power of attorney. Because third parties may be asked to accept the authority of the durable agent years after execution, the concerns they might have about reliance on the purported grant of authority from the principal will be magnified. Indeed, some banks, insurance companies, and other financial institutions have adopted rather arbitrary rules of "staleness."[27] In light of these practical problems, even if the principal wishes to convey the full range of powers permitted under the law by making a general grant of authority, he or she should take care to list as many examples as possible of powers that might be needed.[28]

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[27]For example, some companies have indicated they will not honor durable powers of attorney more than one year old. *See* Schlesinger, *Use of Powers of Attorney, Joint Bank Accounts and Related Issues in Planning for the Management of the Property of the Aging or Incapacitated Client*, 172 Tax L. & Est. Plan. Series (Estate and Financial Planning for the Aged and Incapacitated Client) 27, 65 (1986). Whether or not a third party arbitrarily may refuse to recognize the authority of an agent acting pursuant to durable power of attorney is discussed in Zartman, *The New Illinois Power of Attorney Act*, 76 Ill. B.J. 546 (1988). Mr. Zartman notes that "[t]he most fundamental purpose of the new durable power statute is to ensure reliance by third parties on the agent's authority." *Id.* at 548. He opines that arbitrary refusal by a third party to accept an agent's authority under a durable power of attorney could subject the third party to liability for damages just as if the third party refused to recognize the authority of a guardian who tendered letters of office. *Id.* at 549.

[28]Bos, *supra* note 7, at 695. If the power of attorney calls for a physician's certification of incapacity and the agent tenders a recently executed certification along with the durable power of attorney, the third party should be more inclined to recognize the authority of the agent.

Given a general rule of "the more specific, the better," what clauses should be included in the durable power of attorney to provide for effective property management? Unfortunately, no definitive listing exists of the provisions that should or must be included. Instead, the very best durable powers of attorney are carefully tailored to the precise needs of the client. Thus, the client interview is an extremely important facet in the process of preparing the well-drafted durable power.

At a minimum, the property management durable power of attorney should specify all significant assets. As noted above, this will encourage third parties to rely on the document. Although specificity in describing an asset generally is a good practice, the legal assistance attorney must be careful when drafting the general durable power of attorney to cite the assets and the way they are to be handled as *examples* of the powers contemplated in the general grant, rather than as an exhaustive list of those powers. Otherwise, third parties with whom the agent must deal concerning powers or assets not listed will be even more reluctant to rely on the agent's authority.

In addition to cataloguing assets, the durable power of attorney for property management should set forth any **function** the principal desires accomplished. Though the types of functions that can be included are virtually limitless, consideration should be given to the following "non-military specific" powers: 1) to have access to safe deposit boxes; 2) to sign tax returns; **3)** to sign Internal Revenue Service powers of attorney and to settle tax disputes; **4)** to deal with retirement plans, including IRA rollovers and voluntary contributions; **5)** to fund inter vivos trusts; 6) to borrow funds to avoid forced liquidation of assets; 7) to deal with life insurance; 8) to enter into buy-sell agreements; 9) to forgive and collect debts; 10) to complete charitable pledges;[29] 11) to make statutory elections and disclaimers; 12) to pay salaries of employees; and 13) to settle, pursue, or appeal litigation on behalf of the principal.[30]

Of course, consideration also must be given to including any or all of the usual "military specific" powers that form the basis for most

[29] If the principal wants his attorney-in-fact to have the power to make gifts of any kind, specificity is essential. Because giving away the principal's estate basically is inconsistent with the agent's fiduciary duty, courts have refused to recognize that power in the absence of express authority. *See, sg.*, Aiello v. Clark, 680 P.2d 1162 (Alaska 1984); Mercantile Trust Co. v. Harper, 622 S.W.2d 345 (Mo. Ct. App. 1981).

[30] Lombard, *Planning for Disability: Durable Powers, Standby Trusts and Preserving Eligibility for Government Benefits*, 20 Inst. on Est. Plan. § 1700 (1986). For a more comprehensive list of powers that should be considered in drafting a durable power of attorney for property management, see Drafting, *supra* note 5, at 50.

of the thousands of powers of attorney the typical legal office executes every year.[31]

Finally, the legal assistance attorney should discuss any limitations the client may wish to place on the agent's authority. For example, the principal might want a certain item to remain in the family. In this case, the durable power of attorney should set forth the limitation unambiguously. Additionally, the principal's primary desires are appropriate for inclusion in the durable power of attorney for property management. If, for example, the principal wants particular assets to provide for a child's education, the durable power of attorney should so state. Providing clear guidance as to specific desires and general philosophies will help the agent manage the property in a way that most closely approximates the principal's intentions.

Up to now this article has dealt with the durable power of attorney for property management in a general sense. Nevertheless, certain specific property management uses in the realm of estate planning merit consideration. Traditionally, estate planning has focused on death rather than disability, primarily because death was viewed as certain, while disability was not. This emphasis should be reevaluated for a number of reasons. Because people are living longer and consuming more of their estates, lifetime management has become increasingly important. At the same time, increased educational costs for children are fueling estate consumption and causing wealth transfer within a family by means other than a will. Similarly, current tax laws encourage saving in pension plans, with the assets typically being annuitized over the life expectancy of the retiree rather than being passed on to younger generations. Finally, when the value of an estate drops below $600,000, federal estate taxes are of no concern.[32] Thus, management of an estate during one's lifetime has become more complicated and more necessary.

Perhaps an even more important reason to plan for disability is that statistics show that disability is far more likely to occur than death in persons under sixty.[33] Thus, the average military member is more

[31] *E.g.*, transfer of a vehicle pursuant to United States Army, Europe, regulations. More important than these types of powers might be those listed in section 2471 of the California Durable Power of Attorney Act. This section contains the specific authorizations needed when a principal intends to empower his attorney to act with respect to "benefits from military service." Included are powers such as signing all types of vouchers, moving and receiving property, and filing claims against the government. Cal. Civ. Code § 2471 (West Supp. 1990).

[32] Gilman, *supra* note 25, at 58.

[33] Moses & Pope, *supra* note 16, at 513 (citing Schlesinger, *Drafting the Estate Plan to* Cover Disability, 1973 Inst. on Est. Plan. § 73.201.1).

likely to become disabled than to die while on active duty. With this in mind, it does not make sense for a legal assistance program to concentrate on drafting wills, while making no provision for disability or incapacity—especially given the relatively uncomplicated nature of the durable power of attorney.

The primary estate-planning benefit of the durable power of attorney is found in the very purpose of its creation. As previously noted, the durable power of attorney first and foremost was meant to provide an inexpensive alternative to the costly process of appointing a guardian.[34] It would be a shame to see a significant portion of a military member's estate consumed by guardianship proceedings because he or she became incapacitated, disabled, or missing in action, when a durable power of attorney easily could have avoided that problem.[35] Thus, mere possession of a well-drafted durable power of attorney is the first step in lifetime estate planning.

Another simple use of the durable power of attorney that facilitates planning for incapacity involves a standby trust. A standby trust is an unfunded inter vivos trust set up by an individual with instructions for distribution of the trust's assets should it ever become funded.[36] The individual then executes a durable power of attorney giving his agent the authority to fund the trust if he ever becomes incapacitated.

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[34] *See supra* text accompanying notes ti-8.

[35] In many jurisdictions, guardianship requires payment of annual bond premiums in addition to the initial costs of appointment. Lombard, *10 Reasons Why You Should Be Recommending The Durable Power of Attorney to Your Client*, Prob. and Prop.. Jan.-Feb. 1987, at 28, 28-29 (1987). Additionally. some states require particular decisions to be approved by the court. *Id.* The option of agency in lieu of guardianship has been recognized judicially. In Conover Incompetent. **4** Fid. Rep. 200 (Bucks Co. Pa. 1985), for example. the court refused to appoint a guardian when the agent was properly managing the principal's affairs. For a discussion **of** the guardianship issue. *see* E. Cohen. Durable Power of Attorney: An Important Alternative to Guardianship. Conservatorship, or Trusteeship (1985).

[36] The standby trust actually is an improved version of the revocable living trust With a revocable living trust, an individual can place his property in trust for any of several estate-planning purposes (such as to effect a nonprobate transfer of his property upon his death), and then continue to manage it until he no longer wants to or until he becomes disabled. The main draw-back to these trusts is that the estate has to be of a certain size tojustify the trust's start-up and yearly maintenance fees. The standby trust offers all the advantages of the revocable living trust to smaller estates. Because the standby trust does not come into existence until disability of the principal. no immediate start-up or maintenance fees are present. For a good description of the revocable living trust, the standby trust, and other basic estate planning tools. see M. Kinevan, Personal Estate Planning (20th ed. 1989).

If the principal never loses capacity, the standby trust never will come into existence. On the other hand, if he does, the trust will be funded by his agent and administered according to its terms.[37] In most cases, the trust would provide for the support of the principal and his family during his life. Upon his death, the trust would continue to support his family or could be distributed to them. This is a particularly useful estate planning tool for single parents. Given the number of single parent families in the military and the greater likelihood that a military member on active duty will become disabled rather than die, standby trusts with complementary durable powers of attorney may be more important than wills for many clients.

This is not to say, however, that one who has executed a standby trust should forego executing a will. Although the standby trust is an excellent device for handling the contingencies of disability, the trust is of no value when an individual dies without ever suffering incapacity or disability. Recognizing that this can occur, clients must have wills. Yet, just as the standby trust is not sufficient in and of itself, neither is the will. Consider the rather typical situation of a military parent and his spouse who wish to leave their estates to their minor children should the other spouse predecease them. Normally, the estate would be left to an individual also named in the will as their children's guardian, to be held in trust for the benefit of their children.

Obviously, if this couple dies suddenly, a standby trust is of no benefit. On the other hand, if the will with a testamentary trust is all that is executed, unforeseen events— such as incapacity—can frustrate their intentions. Furthermore, what if the incapacity is of extended duration and during the incapacity the guardians (and trustees of the testamentary trust) named in the will predecease them or become unable to act in that capacity?

The way to prepare for these contingencies is to execute a standby trust, a corresponding durable power of attorney, and a will that includes a testamentary trust. All documents should complement each other. The trustee named in the standby trust presumably would be the same individual named as trustee in the testamentary trust.[38] Additionally, the durable power of attorney should be drafted to per-

[37]The standby trust is known as a "passive" or "dry" trust. If state laws prohibit this type of trust, it can be funded with a token amount of property.

[38]Of course if the standby trust is funded because of the principal's disability, he or she would not want the testamentary trust to be created. The solution is to include language to that effect in the will.

mit the agent to cope with unforeseen events that might occur after execution of a will and during the incapacity of the principal, such as the death of the guardians-trustees nominated in the principal's will.

Obviously, limitations exist on the agent's ability to resolve unanticipated problems that might arise. As an example, the agent cannot modify the terms of the will to name a new guardian.[39] The agent can, however, subject to state law, be empowered to do virtually anything with the standby trust. In our example, the agent who funds the standby trust could be given the power to name a new trustee if the individuals named in the standby trust and the will are unable or unwilling to act.[40] The durable power of attorney could require that the agent name as subsequent trustee the person who is named as guardian of the children. Thus, the standby trust could be used to fulfill the testator's intent when events occurring after a disability would frustrate that intent if a will was the testator's only estate-planning document.

The durable power of attorney and the standby trust, in conjunction with the will and the testamentary trust, provide a more comprehensive plan for estate management than either standing alone and should be considered for inclusion in every installation's legal assistance program. Though the drafting of complex trusts calls for more specialized expertise than is available in most legal offices, many offices do prepare simple testamentary trusts for inclusion in wills. A standby trust need not be any more complicated than these testamentary trusts.

Many of the other refinements in estate planning made possible by the durable power of attorney are beyond the scope of the legal assistance provided by the typical legal office.[41] Nevertheless, one additional variant of the durable power of attorney exists that is

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[39] Restatement (Second) of Agency (1958).

[40] This is a key advantage of standby trusts over testamentary trusts. Once executed, the terms of a testamentary trust cannot be altered without revoking the will itself. The terms of a standby trust, in contrast, can be modified anytime during the client's lifetime, even by his agent in the event of incapacity. Legal assistance attorneys must be cautious, however, because state law may prohibit the amendment of a trust by an agent unless the power is noted in the trust itself *See, e.g.*, Cal. Prob. Code § 15401(a)(1) (West Supp. 1990).

[41] For a detailed analysis of the advantages and disadvantages of the durable power of attorney in the context of some fairly sophisticated estate planning, see Drafting, *supra* note 5. One area of estate planning about which the durable power of attorney has raised a number of issues is asset shifting by gifts and disclaimers. The overwhelming majority of military legal assistance clients are not likely to be concerned with this aspect of estate planning.

relatively straightforward and that will appeal to a great many clients —the durable power of attorney for health care.

B. THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Health care decisionmaking is something that concerns most individuals even more than property management. Accordingly, military personnel may be more interested in a durable power of attorney for health care than they are in one for property. In essence, the durable power of attorney for health care is nothing more than a durable power granting the agent the authority to make decisions regarding medical treatment if the principal becomes unable to do so.[42] Although its use is relatively unfamiliar in both the lay and legal community, the durable power of attorney for health care is a document that few individuals should be without. Nowhere is this more true than in the military, where soldiers, sailors, and airmen regularly face life-threatening situations.

Durable powers of attorney for health care, together with a related document—the living will—are starting to receive increased attention as medical advances continue to extend American life expectancy. One of the costs of increased life expectancy is a greater likelihood of requiring extensive medical care at some point in a person's life.[43] As a result, Americans are more concerned than ever about issues such as the nature and quality of the medical care they receive[44] and the use of extraordinary measures to sustain life. These

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[42]The authority to make health care decisions can be included in a durable power of attorney vesting power over property. A separate durable power of attorney for health matters has some advantages. The principal may not want those dealing with the agent on property matters to become aware of his desires regarding medical treatment; he may want a different agent; state law may have differing legal requirements and limitations (for example, in California a durable power of attorney for health care is only valid for seven years); and the principal may want one to be springing and the other not. Collin, *Planning and Drafting Durable Powers of Attorney for Health Care*, 22 Inst. on Est. Plan. § 505.5 (1988). Collin's article and Drafting, *supra* note 5, are the best and most comprehensive works on the durable power of attorney for health care.

[43]One in four individuals over the age of 65 will at some point reside in a nursing home. Collin, *supra* note 42, § 501.7 (citing General Accounting Office, Report to the Special Committee on Aging, U.S. Senate, Medicare and Medicaid: Stronger Enforcement of Nursing Home Requirements Needed 2-3 (1987)).

[44]To some extent, this concern is justified. For example, one in 25 individuals over 65 can expect to be the victim of elder abuse. Collin, *supra* note **42,** § 501.6 (citing Winter, *The Shame of **Elder** Abuse*, Modern Maturity, Oct.-Nov. 1986, at 50). Similarly disturbing statistics concern the quality of health care. According to the **GAO,** 41% of skilled nursing homes and 34% of intermediate health care facilities do not meet federal certification standards. Collin, *supra* note **42,** § 501.7.

concerns have been exacerbated by the intense publicity generated by cases such as those involving Karen Ann Quinlan and Elizabeth Bouvia.[45] The result has been a frenzy of legislative and judicial activity in an effort to make the law more accurately reflect American expectations concerning the right to determine the type and extent of medical treatment following the onset of incapacity.[46]

The durable power of attorney for health care has proven responsive to these concerns. Obviously, everyone would hope to receive medical treatment based solely on completely informed consent.[47] Unfortunately, physical or mental disabilities can render individuals unable to make informed decisions for themselves. When this occurs, the best alternative is to have a trustworthy surrogate decisionmaker available to act on behalf of the disabled individual. The durable power of attorney for health care provides a means to realize this alternative. With it, the principal can appoint an agent whom he or she trusts to carry out the principal's medical treatment desires.

The infinite degree of specificity permitted in drafting a durable power of attorney for health care serves to effectuate the principal's wishes. Under tenets of agency law, the agent will be able to exercise any of the powers the principal lawfully may delegate.[48] Further, the potential for specificity in a durable power of attorney for health care is limited only by the draftsmanship of the attorney involved. As a result, the principal can control very precisely the exact procedures that are administered to him while he is incompetent.

An additional benefit of the durable power of attorney that contributes to the goal of providing each individual control over his or her body is the ability to appoint multiple agents. For example, the principal may delegate to one agent all powers except for the right

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[45] *In re* Quinlan, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976); Bouvia v. Superior Court of Los Angeles, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986). Both cases involved withholding or withdrawing medical treatment. Advanced treatment procedures have prolonged the dying process because chronic degenerative diseases have supplanted infectious diseases as the primary cause of death in people over 65. Collin, *supra* note 42, § 501.3 (citing Siegel & Taeuber, *Demographic Dimensions of an Aging Population*, in Our Aging Society 79, 93 (1986)).

[46] Efforts to promulgate living will statutes have been successful. Today over 40 states have passed such legislation. Schmitt, *Living Wills*, 16 The Reporter 2, 7 (1989).

[47] An analysis of the standards for competency and informed consent is beyond the scope of this article. For excellent discussions on these issues, see Dubler, *Health Care Decisions: Enforcing Autonomy and Delegating Authority*, 172 Tax L. & Est. Plan. Series *(Estate Planning for the Aging or Incapacitated Client)* 225, 258-61 (1986); and President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1 Making Health Care Decisions 15-51 (1982).

[48] Lombard, *supra* note 35, at 28.

to order the withholding of medical care, while giving that power to another agent. This type of arrangement might be desirable if the principal is worried that the first agent's devotion and compassion would overcome reason in the difficult process of determining whether to allow the principal to pass on. Similarly, a principal may wish to appoint one agent to handle all administrative and financial matters related to the illness, while having another make the purely medical decisions.

The durable power of attorney for health care offers a number of other advantages over more traditional methods of making health care decisions for the incompetent. As noted earlier, the expense, effort, and limitations of guardianship can be avoided with a durable power of attorney.[49] Given both the cost of guardianship and the mental anguish friends and relatives will experience because of the principal's illness, the opportunity to dispense with a guardianship proceeding is an advantage that must not be overlooked.

The durable power of attorney for health care also can serve to avoid disagreements that might result when health care decisions are made for the incompetent. For example, the incompetent's family might not agree with the attending physician on the proper course of treatment.[50] Vesting unambiguous decisionmaking power in an agent generally will render the physician's opinion purely advisory.

A much more common problem is disagreement between family members.[51] Though statutory guidance generally sets forth a hierarchy of decisionmakers, such statutes usually fail to differentiate among individuals of like relationship.[52] This problem most commonly

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[49] *See* ***supra*** notes 8 and **35.**

[50] Peters, ***Advance Medical Directives: The Case for the Durable Power of Attorney for Health Care,*** 8 J. Legal Med. **437, 452-53 (1987).**

[51] Health care providers report that conflicting guidance from relatives is common. Collin, ***supra*** note **42, § 504.3.**

[52] The Louisiana Natural Death Act, for example, sets forth the following order for decisionmaking:

(a) Judicially appointed tutor or curator,
(b) The patient's spouse not judicially separated,
(c) An adult child of the patient,
(d) The parents of the patient,
(e) The patient's siblings,
(f) The patient's other ascendants or descendents.

La. Rev. Stat. Ann. § 40.1299.58.5(A)(2) (West Supp. **1990).** The statute further provides that when more than one member of the class exists, the decision must be unanimous. ***Id.*** § 40.1299.585(A)(3). Obviously, this scheme permits a single intransigent family member to frustrate the interests of the patient and encourages litigation. For a discussion of this point, see Comment, ***The Dilemma of the Person in a Persistent Vegetative State: A Plea to the Legislature for Help,*** **54** Mo. L. Rev. **645, 669-70 (1989),** and Vitiello, ***Louisiana's Natural Death Act and Dilemmas in Medical Ethics,*** **46** La. L. Rev. **259, 303 (1985).**

occurs among children of the incompetent. The durable power of attorney for health care not only can break the tie by selecting among the "contenders," but also offers the possibility of avoiding the problem altogether by providing for appointment of an agent whose selection will not cause a severe family rift. Indeed, the incompetent might not want a family member making decisions. This typically is the case when the individual is estranged from his family, but it also may reflect the desires of an individual who wishes to shield his loved ones from the anguish of heartbreaking decisions.[53]

Despite its many advantages, the durable power of attorney is not statutorily recognized in all fifty states. Though the clear trend is towards providing a legislative basis for the document, currently less than a fifth of the states have passed statutes specifically providing for such powers of attorney.[54] Jurisdictions that have not done so take a number of different approaches to the issue. Some simply include the right to make medical decisions in the litany of powers that may be granted an agent.[55] A narrower and less satisfactory practice adopted by a number of states is to permit proxy appointment in a living will statute.[56] Finally, appointment power may be found in unexpected forms of legislation, such as the family consent statute.[57]

Often, however, a state will have no statutory basis for a durable power of attorney for health care. Despite this, most commentators feel the document can be executed in accordance with the standard

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[53]Family members may have a basic conflict of interest with the principal. Obviously, because they are most likely to be the benefactor of the principal's estate, they have an interest in not depleting it. At the same time, family members are the most likely to suffer emotionally from the loss of the principal. Thus, while they might he motivated to end the principal's life, they may be inclined to prolong it unnecessarily..

[54]*See, e.g.*, Cal. Civ. Code. §§ 2430-2444, 2500-2508 (West Supp. 1990); Idaho Code § 39-4505 (Supp. 1989); Ill. Ann. Stat. ch. 110 1'2, para. 804 (Smith-Hurd Supp. 1989): Nev. Rev. Stat. § 499.800 (Michie Supp. 1989); R. I. Gen. Laws § 23-4.10-2 (Supp. 1988); Tex. Rev. Civ. Stat. Ann. art. 4590h-1 (Vernon Supp. 1990); Utah Code Ann. § 75-2-1106 (Supp. 1989).

[55]Colo. Rev. Stat. Ann. § 15-14-501 (West 1989); Me. Rev. Stat. Ann. tit. 18, § 5-501 (Supp. 1989); N.C. Gen. Stat. § 32A-1 (1983); Pa. Cons. Stat. Ann. 20-5603(h) (Purdon Supp. 1989).

[56]*See, e.g.*, Ark. Stat. Ann. § 20-17-202 (Supp. 1989); Del. Code Ann. tit. 16 § 2502(b) (1983): Fla. Stat. Ann. § 765.05(2) (1986); Idaho Code § 39-4504 (1989): Iowa Code Ann. § 144A.7 (West 1989); La. Rev. Stat. Ann. § 40:1299.58.3(c)(1) (West Supp 1990); Utah Code Ann. § 75-2-1106 (Supp. 1989); Va. Code Ann. § 54.1-2984 (Supp. 1989). Attorneys considering using the living will as the mode of appointment should remember that this method does have the disadvantage of generally permitting decidons only as to the withholding or withdrawal of treatment.

[57]*E.g.*, Wash. Rev. Code Ann. § 7.70.065 (Supp. 1990).

state durable power of attorney statute[58]—an opinion the judiciary has tended to support.[59] Proponents of this view point to the fact that no statute prohibits inclusion of a health care provision in a durable power.[60] They also cite basic agency principles that permit the delegation of nearly any of the principal's power.[61] Thus, the absence of statutory authorization should be no cause for concern by judge advocates asked to draft a durable power of attorney for health care.

On the other hand, legal assistance attorneys should be wary of the technical requirements and limitations of these documents in the jurisdiction in which they practice. The lack of uniformity from state to state calls for extreme caution when drafting and executing a durable power of attorney for health care. For example, in some states only the statutory format is acceptable, while in others the statutory format is optional.[62] Differences also exist with regard to execution,[63] scope of agency permitted,[64] methods of revocation,[65] and whether springing powers are allowed.[66] In Georgia, a power of attorney is presumed to be durable unless provided for otherwise in the document.[67] Given these differences, military attorneys who are not intimately familiar with the laws of the state in which they are practicing should take a conservative approach when drafting a durable power of attorney for health care.

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[58]*See* Note, ***Appointing an Agent to Make Medical Treatment Choices,*** 84 Colum. L. Rev. 985, 1008-20 (1984); Bos, ***supra*** note **7,** at 695.

[59]An excellent case to illustrate the use of a durable power for health care decisions is ***In re*** Peter *ex rel.* Johanning, 529 A.2d 419 (N.J. 1987). **Mrs.** Peters had executed a durable power of attorney appointing Mr. Johanning her agent prior to entering a persistent vegetative state. He subsequently was appointed her guardian. In authorizing the withdrawal of nutrition and hydration based on Mr. Johanning's direction, the New Jersey Supreme Court held that the New Jersey statute should be interpreted to include health care even though it was not mentioned specifically. ***Id.*** at 426.

[60]Collin, *supra* note 42, § 5-504.5(A).

[61]As previously noted, certain powers cannot be delegated. Generally, they tend to involve matters in which the individual must act in a capacity distinct from all others, such **as** voting, wills, and oaths. As Collin points out, the regular judicial appointment of surrogates for incompetent patients and the reliance of medical personnel on consent by family members illustrate that the law does not view medical decisions as falling within that category. Collin, ***supra*** note 42, § 504.5(B).

[62]The California and Illinois statutes, for example, contain no such restriction. Cal. Civ. Code § 2444 (West Supp. 1990); Ill. Ann. Stat. ch. 110 1/2, para. 804.9 (Smith-Hurd 1989).

[63]See ***infra*** notes 76-78 and accompanying text.

[64]*See, e.g.*, ***supra*** note **24.**

[65]For example, South Carolina, Texas, and West Virginia provide that if a guardian is appointed, the durable power terminates. In other states however, the agency continues, but the agent must account to the guardian. ***See, e.g.***, S.C. Code Ann. § 62-5-501(b) (Law. Co-op. 1987); Tex. Prob. Code § 36A(e) (Vernon Supp. 1990).

[66]See *supra* note 15 and accompanying text.

[67]"A written power of attorney, unless expressly providing otherwise, shall not be terminated by the incompetency of the principal." Ga. Code Ann. § 10-6-36 (1989).

Legal assistance attorneys also should consider whether the client needs a springing or nonspringing power of attorney. Generally, a nonspringing power will avoid validity problems in jurisdictions that prohibit use of a springing power. Of greater significance is the fact that the nonspringing durable power of attorney for health care probably is more practical because it will avoid any question of whether the springing event has occurred should an emergency situation arise in which time is of the essence.

In many cases, however, a client will want a springing durable power of attorney for property because of a legitimate concern that his or her agent could exercise a nonspringing power while the principal was fully competent. Indeed, these concerns are the hallmark of wise property management. This danger, however, does not exist with a durable power of attorney for health care. An agent would not be able to act on behalf of a principal concerning health care matters while the principal remained competent. Therefore, attorneys should encourage clients to execute two powers of attorney: a springing durable power of attorney for property management and a nonspringing one for health care.

Despite the many advantages of a durable power of attorney, the living will has generated even more attention.[68] Because living wills also are designed to facilitate health care decisionmaking, legal assistance clients must be counseled on the relative merits of each. Depending on the client's desires, either may be more appropriate. Certain clients should have both.

Some commentators assert that the durable power of attorney for health care is more useful than a living will in nearly every sense.[69] Certainly, the durable power of attorney is a more flexible tool for managing health care decisionmaking because it permits a surrogate to make decisions on behalf of a patient who is not terminal. In contrast, a living will is designed almost exclusively as a medical directive concerning the withdrawal or withholding of life-sustaining measures. For example, a living will often is meaningless for a patient in a nonterminal, yet permanently vegetative, state.[70]

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[68]For a brief discussion of living wills, see Schmitt. *supra* note 46. at 2.

[69]Peters, *supra* note 50, at 438. A preference for the durable power of attorney for health care also was expressed in President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment **147** (1983).

[70]In 1986. for example, over 10.000 patients were hospitalized in a permanent vegetative state. Peters, *supra* note 50, at 443 (citing Hoffman, *Increased* ***Attention*** *Sought on Bioethical Concerns*. Am. Med. News, May 9, 1986, at 54).

An additional criticism made by many health care providers is that living wills often are drafted too broadly to provide the type of guidance they require.[71] Though this problem can be alleviated by skillful draftsmanship, in many cases the statute providing for the living will limits the attorney's ability to do so. A more fundamental criticism is that because most living wills do not provide for appointment of a proxy, little opportunity exists to reconsider the appropriate medical course of action for the patient should circumstances change. Thus, with a living will, informed consent occurs only at the moment of execution, not treatment. By contrast, the appointment of an agent in a durable power of attorney for health care permits a response to changed conditions.[72]

Despite some valid criticisms, the living will does have a number of advantages. A living will avoids the necessity of having others serve in a decisionmaking capacity. Many principals may not want their loved ones to have to experience the trauma of making a decision that will end the principal's life. Living wills often are advantageous from a legal standpoint as well, if only because a living will is much more likely to have a statutory basis than a durable power of attorney for health care. This not only eases draftsmanship, but also increases the likelihood that it will be upheld judicially. Finally, health care providers are more familiar with living wills and thus more likely to act in accordance with them. In some states, civil and criminal penalties exist for failure to comply with a living will and for refusal to transfer the patient to a facility that will.[73] Nevertheless, because of its inherent flexibility, a durable power of attorney for health care generally is a better approach to take when planning for incapacity.[74]

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[71] Peters cites problems with the vagueness inherent in such terms as "recovery," "hopeless pain," "deterioration," and "reasonable chance of recovery." Peters, *supra* note 50, at 446-47.

[72] Collin, *supra* note 42, § 504.2. One possible changed scenario might involve finances. Many individuals consider the withholding or withdrawal of medical care simply because they are concerned about being a financial burden on their loved ones. By the time the living will comes into effect, however, their financial position may have improved. Additionally, those who they wished to shelter already may have predeceased them.

[73] Schmitt, *supra* note 46, at 2.

[74] Additional articles related to durable powers of attorney for health care issues that were not previously cited, but may be of interest to the reader, include: Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law,* 28 Ariz. L. Rev. 373 (1986); Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney,* 63 Neb. L. Rev. 779 (1984); Rhoden, *Litigating Life and Death,* 102 Harv. L. Rev. 375 (1988); and Teitler, *Contingency Planning for Incapacity,* 164 Tax L. & Est. Plan. Series (Practical Pre-Retirement Planning) 65 (1986).

IV. DRAFTING THE DURABLE POWER OF ATTORNEY

The key to drafting an effective durable power of attorney for either property or health care is creating a document that closely approximates the principal's wishes. Obviously, then, the client is the best source of information for the legal assistance attorney drafting the durable power of attorney. With the possible exception of a doctor, no one will have a greater understanding of a client's medical condition and the nature and extent of the client's property interests. At the same time, no one will have given more thought to how he or she wants his or her property disposed of or how a particular medical condition should be treated. By working closely with the client, the attorney can prepare a document tailored to meet the client's individual needs and desires.[75]

Before turning to specific clauses that might be considered for inclusion in a durable power of attorney, several caveats are in order. Unless the attorney drafting the document is quite familiar with state law, the statutory format should be used. Unfortunately, as a general rule, the prescribed formats lack the specificity that one ideally would like to see in every durable power of attorney—particularly those for health care. Nevertheless, absent particular expertise on the part of the drafter, the limitations of the statutory format probably are outweighed by the potential risks of running afoul of state law.

Additionally, legal assistance attorneys should be aware that some states require more formality in the execution of a durable power of attorney than a regular power of attorney. For instance, in Connecticut, a durable power of attorney used to convey real estate must be acknowledged by the principal in the presence of two witnesses.[76] In South Carolina, a durable power of attorney must be executed before three witnesses using the procedural formality required for a will, and it must be probated and recorded in the same manner as a deed.[77] Therefore, all durable powers of attorney should be notarized and executed in the presence of at least two unrelated and disinterested witnesses. Further, the witnesses should attest that the

[75] At the same time, the durable power of attorney for health care should be discussed with the agent to ensure he or she is comfortable carrying out the tasks set forth.

[76] Conn. Gen. Stat. Ann. § 45-69o (West Supp. 1990).

[77] S.C. Code Ann. § 62-5-501(c) (Law. Co-op. 1987). Texas requires all durable powers of attorney except those for health care to be recorded. Tex. Prob. Code § 36A(c)(4) (Vernon Supp. 1990).

principal is of sound mind and under no duress, fraud, or undue influence.[78] By executing the document with the same formality as a will, the threshold requirements of all states will be met. This is particularly important for military personnel, who are more likely than most individuals to move from state to state.

Finally, given the array of statutory and common-law differences among states, clients should have their durable powers of attorney reviewed by a legal assistance attorney as soon as possible after every permanent change of station.[79] Even those who do not move to another jurisdiction should seek a periodic review. This will help ensure that the document keeps track with statutory requirements, and is necessary because statutes in certain states provide for automatic revocation of the durable power of attorney after a certain period of time.[80]

Turning from general guidance to the specific clauses that can or should be included in a durable power of attorney, attorneys must remember that the document should be tailored to the needs and desires of the client. Therefore, a comprehensive catalogue of clauses for inclusion not only is beyond the purview of this article, but also is generally ill-advised.[81] Further, military attorneys should be sensitive to their limitations and should be willing to refer the client to a competent civilian attorney when necessary. Nevertheless, legal assistance attorneys willing to draft a durable power of attorney for either property management or health care might wish to consider the following relatively basic provisions:

1) A clause setting forth the method by which the determination of loss of capacity is to be made. In most cases, it would be advisable that not less than two physicians concur that the

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[78] Peters, *supra* note **50,** at **456.**

[79] In particular, the durable power of attorney for health care should be reviewed to determine if any provisions might violate public policy in the state. For example, if a durable power of attorney for health care directs withdrawal of nutrition and hydration, the current state of the law in the jurisdiction should be discussed extensively with the client. This issue remains in statutory and judicial flux throughout the nation.

[80] For example, a durable power of attorney for health care is valid for only seven years in California. Cal. Civ. Code § **2436.5** (West Supp. **1990).**

[81] Among the works that discuss provisions that might be included in a durable power of attorney for health care are: Drafting, *supra* note **5,** at **21-48.3;** Gouskos, *supra* note **13,** at 49; Fockler, *Living Wills, Organ Donation, and Durable Powers of Attorney,* Tenn. B.J., **23, 23-25 (1987);** Lombard, *supra* note **35,** at **30;** Lombard, *supra* note **30,** § **1706.2;** Peters, *supra* note **50,** at **456-62;** *Society for the Right to Die, What You Should Know About the Durable Power of Attorney,* **178** Tax L. & Est. Plan. Series (Estate and Financial Planning for the Aging or Incapacitated Client) **237 (1988).**

principal is no longer competent. Because of the need for immediate care in emergency situations, however, a clause permitting the determination to be made by one physician when life-threatening injuries have been suffered is advisable in a durable power of attorney for health care.

2) An appointment of at least one secondary agent in the event the primary agent cannot be located. Given the mobility of military personnel, judge advocates may wish to consider giving the secondary agent full power when the primary agent is overseas—particularly in a remote location. The decision to do so should be based on considerations such as the likelihood of the agent's deployment and the ease with which the agent can be contacted overseas.[82]

3) A declaration as to who the principal wishes the guardian to be if there is a judicial adjudication of incompetency. In most cases this will be the person who was appointed the agent. This clause is necessary because a court-appointed guardian may have the power to revoke the agency relationship created by his ward while competent.[83] Additionally, if the durable power of attorney fails as a result of legal flaws, there will be a greater chance that the named agent will be appointed guardian.

4) A release of liability for the agent and, possibly, third parties, for actions based on the durable power of attorney. This provision will act to encourage use of, and reliance on, the durable power of attorney.[84]

5) **A** declaration that the durable power of attorney is effective regardless of the wishes of any nondesignated family member. Especially with regard to the durable power of attorney for health care, this provision will avoid **any** confusion

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[82]The principal also might consider inserting a clause stating that the durable power of attorney for health care should be considered as evidence of the principal's intent in the event the agent cannot be located.

[83]For **a** discussion of this point, see Comment, ***Appointing** an Agent to **Make Medical Treatment Choices,*** 84 Colum. L. Rev. 985, 1027 (1984). The Unif. Probate Code § 5-503(a), 8 U.L.A. 514-15(1989), allows for the nomination by the principal of the agent as guardian.

[84]As noted in Lombard & Emmert, *The Durable Power* d **Attorney:** *Underused Tool*, Nat'l L.J., Oct. 29, 1984, at 18, col. **4,** because a fiduciary relationship exists between the principal and the agent, the agent may be liable if he acts imprudently. For an example of statutorily imposed fiduciary liability, see S.C. Code Ann. § 62-5-501(a) (Law. Co-op. 1987).

that might arise concerning the effect of the state statutes that permit relatives to make decisions in the absence of informed consent.

6) A grant of authority to the agent to initiate legal proceedings against third parties who refuse to comply with the durable power of attorney and the agent's authority thereunder.[85]

7) A choice of law provision. Generally, this provision should provide that the durable power of attorney is valid in any jurisdiction and that the law of the place where the document was executed should be used for purposes of interpretation.[86]

Because of its unique nature, the durable power of attorney for health care merits consideration of several additional provisions. Again, the list is far from exhaustive, and inclusion of any particular provision will depend on the client's individual needs and desires. Additionally, when practical, the client's health care provider should be included in any interview concerning a durable power of attorney for health care. This will allow the physician to explain medical options for the client, clarify the client's precise desires, and assist the attorney in drafting a document that will be clear and unambiguous to medical personnel.[87] Among the provisions that might be considered for the durable power of attorney for health care are the following:

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[85]For instance, if a physician or hospital refuses to comply with an agent's request to withdraw medical treatment, the agent should be able to bring an action for battery on behalf of the principal.

[86]The effect of a choice of law provision will be governed by the law of the state where the durable power of attorney is to be used. Therefore, it may be of no value. Nevertheless, that clause always should be included. According to Restatement (Second) of Conflict of Laws § 291 (1969), the rights and duties of the principal and agent are governed by the law of the state with the "most significant relationship to the parties and the transaction." When health care matters are concerned, this probably will be the state in which the patient is being cared for.

[87]According to Collin, "[p]hysicians report that advance directives written by laymen are often vague or ambiguous and therefore offer little guidance. They are also concerned that broad statements of philosophy made well in advance of a serious illness or condition are scant authority for making life and death decisions." Collin, *supra* note 42, § 505.2.

1)The right to consent to or refuse medical treatment.[88] This provision should set out the principal's treatment desires with as much specificity as possible. Particular attention should be paid to any unique medical conditions the principal may have.

2) The measures to be taken if the client becomes terminally ill or enters a permanent vegetative state. In particular, a durable power of attorney for health care should specify whether the withholding or withdrawal of life-sustaining measures is permissible or whether every effort should be made to preserve the life of the principal. It also is advisable to address the issue of whether withholding of nutrition and hydration is permissible.

3) Permission for access to medical records as well as the authority to disclose those records to medical personnel.

4) The right to retain and discharge medical personnel.

5) The authority to admit the principal to medical facilities and provide for residence.[89]

6) The authority to pay bills.[90]

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[88]Extensive case law exists upholding the right to refuse medical treatment, based on either a state or federal constitutional right to privacy or a common law right of self-determination in medical matters. This right often has been extended to an order to withdraw nutrition and hydration. For illustrative cases, see Gray v. Romero. 697 F. Supp. 580 (D.R.I. 1988); Tune v. Walter Reed Army Medical Hosp.. 602 F. Supp. 1452 (D.D.C. 1985); *In re* Farrel, 108 N.J. 335, 529 A.2d 404 (1987); Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Kptr. 484 (Cal. Ct. App. 1983); *In re* Quinlan, 71 N.J. 10, 355 A.2d 647 (1976); *see also* Drafting, *supra* note **5,** at **25-43;** Capron, *Legal and Ethical Problems in Decisions for* ***Death,*** 14 L. Med. & Health Care 141 (1986); Unif. Rights of the Terminally Ill Act, 9B U.L.A. 609 (Supp. 1989).

Some states have statutory restrictions on the types of medical treatment that can be consented to by an agent. In California and Nevada, for example, an agent cannot consent to convulsive treatment, psychosurgery, sterilization, or abortion. Cal. Civ. Code § 2435 (West Supp. 1990); Nev. Rev. Stat. Ann. § 449.850 (Michie Supp. 1989).

[89]It may be advantageous to specifically draft this provision so as to include psychiatric facilities and nursing homes. The drafter must be familiar with local laws on this matter. For example, in California the agent may not consent to placement in a mental health facility. Cal. Civ. Code § 2435 (West Supp. 1990).

[90]This provision is particularly important if the principal has appointed different agents in a durable power for property and a durable power of attorney for health care. Collin suggests that the health care agent be directed to contact the property agent when decisions are to be made and that the property agent be directed to pay for medical treatment ordered by the health care agent. Collin, *supra* note 42, § 505.5, at 5-67.

7) The authority to make anatomical gifts and advance funeral arrangements.

8) A directive concerning any religious wishes, such as a refusal of blood transfusions.

9) The authority to order the administration of pain relief medication.[91]

Once the power of attorney has been drafted, at least three copies of it should be executed. Obviously, both the agent and principal should maintain a copy. In addition, if health care is involved, the third copy should be placed in the principal's medical records. Doing so is critical for military personnel and dependents because they move so often. Principals also should discuss these documents with their new health care providers when they arrive at their next assignment to ensure their desires are understood.

Should it ever become necessary to revoke a durable power of attorney, the revocation should be in writing, witnessed, and notarized. Though this procedure is much more extensive than most states require,[92] it will assure a legally effective revocation in every jurisdiction. Copies should be delivered to any person likely to see the original document. Certainly, financial institutions with which the principal has business ties should be contacted. Additionally, in the case of the durable power of attorney for health care, copies should be given to the health care provider and placed in the principal's records. The goal is to notify all individuals and institutions who might have reason to rely on the original document that it no longer represents the principal's desires. Of course, all copies of the original power of attorney should be destroyed.

V. CONCLUSION

The durable power of attorney—a power of attorney designed to survive the incapacity of the principal—is a fairly recent innovation that, at least for purposes of property management, is now recogniz-

[91] This authority will complement the right to order the withholding or withdrawal of treatment, hydration, and nutrition. Additionally, it will facilitate the principal's willingness to donate organs by providing pain relief as the medical facility prepares for organ removal upon death.

[92] The California statute, for example, permits oral or written revocation and prescribes no particular format. Cal. Civ. Code. § 2437 (West Supp. 1990).

ed in all fifty states. **A** growing number of states also are providing a statutory basis for the durable power of attorney for health care. Unfortunately, however, the requirements of, and limitations on, these documents vary widely. Therefore, the prudent legal assistance attorney will proceed cautiously and only after **a** close examination of the applicable state laws governing durable powers.

Despite the problems inherent in drafting an instrument that is so heavily dependent on state law, legal assistance attorneys must realize that for the average military member, effective planning for disability probably is more important than planning for death. Though we tend to realize that dying intestate can produce undesirable consequences, we often overlook the hardships of incapacity that can be avoided with a durable power of attorney. Therefore, the durable power of attorney should be viewed as an estate-planning tool that is at least as important as a will. Given the relative youth of most members of the armed forces, the durable power of attorney actually may be more useful than a will. **A** truly comprehensive legal assistance program will recognize this fact and offer military personnel durable powers of attorney for basic health care and property management needs.

THE DEPARTMENT OF VETERANS' AFFAIRS HOME LOAN GUARANTY PROGRAM: FRIEND OR FOE?

by Major Bernard P. Ingold*

I. INTRODUCTION

Since its inception in 1944, over eleven million service members have taken advantage of the Department of Veterans' Affairs (VA) Home Loan Guaranty Program to purchase their portion of the American dream! The VA home loan guaranty program allows eligible service members to purchase homes with no down payment at relatively low fixed-interest rates. These loans may be assumed later by veterans or nonveterans without major administrative or financial constraints.

Despite its many advantages, the home loan program has had some serious difficulties in recent years, including an alarming rise in the number of defaults on VA loans.[2] The happy relationship between the veteran and the VA can become quite antagonistic when things start to go wrong. Because veteran-borrowers agree to indemnify the VA for any losses the VA sustains as a result of the guaranty, the VA and the veteran often become adversaries when a default on the

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[1]Dep't of Veterans' Affairs, Pam 26-6, To the Home Buying Veteran (Jan. 1984) [hereinafter VA Pam 26-61.

[2]The legislative history to Public Law 100-198 indicates that the default rate rose from fiscal year 1985 to fiscal year 1986 by 13.2% (from a total of 2.7% to 3%). The number of claims paid by the VA on foreclosed properties rose from 30,277 to 33,622 an increase of 14.4%. The cost to the VA of payment of guaranties and acquisition of property rose from $290 million in fiscal year 1984 to $575 million in 1986.

guaranteed loan occurs. A number of statutory, administrative, and judicial options are available to help a veteran avoid or reduce the potentially catastrophic financial consequences associated with defaulting on a VA-guaranteed loan. In all too many instances, however, veterans have misunderstood or failed to take advantage of the programs and remedies available to them.

The high foreclosure rates on VA guaranteed loans have spurred Congress to develop methods to reduce foreclosures and better protect the interests of the VA and the veteran. Congress recently has amended the program and inserted new procedures designed to help assure that those assuming loans are good credit risks. New legislation also contains provisions that will help service members better understand their rights and obligations under the home loan guaranty program. In the most recent modification to the loan program, Congress established an indemnity fund to be used to lower the risk of loss to the veteran and the VA in the event of loan foreclosure.

11. HISTORY OF THE VA LOAN PROGRAM

The VA home loan guaranty program was established by the Servicemen's Readjustment Act of 1944 (the Act).[3] The Act was designed to help returning veterans who, due to their military service, were unable to establish a credit history to qualify for a mortgage. Under the initial legislation, a veteran with at least ninety days of active-duty service was eligible for a home loan guaranty of up to fifty percent of the mortgage not exceeding $2000.

The 1944 Act was to expire within five years after the end of World War II. The program was so successful, however, that it was extended a number of times throughout the 1950's and 1960's. Not until 1970 was the home loan program made a permanent benefits program.[4]

The program has been modified and expanded over its forty-five year history. To keep pace with rising home costs, the basic entitlement has risen steadily from its original level of $2000. The amount increased to $4000 in December 1945, $7500 in July 1950, $12,500 in May 1968, $17,000 in December 1974, $25,000 in October 1978, $27,500 in October 1980, and $36,000 in March 1988. Under the most recent change—made in December 1989—the basic entitlement was increased to $46,000.

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[3] Act of Dec. 28, 1946. Pub. L. No. 79 268, § 506, 59 Stat. 630, 643.
[4] 38 U.S.C. § subchs. I - III.

The overriding federal interest in the loan program is "to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both veteran and the Veterans' Administration as guarantor of the veteran's indebtedness."[5] To ensure that this interest is met, Congress has modified the program throughout the years. These changes have introduced a high degree of complexity into what began as a relatively simple, temporary program.

III. THE HOME LOAN GUARANTY PROGRAM

A. *ELIGIBILITY REQUIREMENTS*

Congress has been very generous in making most active duty and discharged service members eligible for the home loan guaranty program. All service members on active duty with the United States armed forces are eligible to participate in the program if they have served for at least 181 days.

Discharged service members also are eligible depending on the length and date of service and character of discharge. Veterans who have served in peacetime[6] must have been on continuous active duty for over 181 days and must have been released under conditions other than dishonorable. Enlisted personnel discharged after September 7, 1980, and officers with service after October 16, 1981, must have completed twenty-four months of continuous active duty or the full period of active duty (of at least 181 continuous days of active duty) and must have been discharged or released under conditions other than dishonorable.[7] Those soldiers serving in peacetime who have been discharged for a service-connected disability do not have to satisfy the 181 day continuous active-duty service requirement.

Wartime veterans are eligible if they have served on active duty for at least ninety days and been discharged under other than dishonorable conditions.8 Service members separated for a service-

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[5]United States v. Shimer, 367 U.S. 374, 383 (1961).

[6]Service is considered during peacetime if it falls entirely within one of the following periods: July 26, 1947, to June 26, 1950; February 1, 1955, to August 4, 1964; or May 8, 1975, to September 7, 1980 (if enlisted) or to October 16, 1981 (if officer). Dep't of Veterans' Affairs, Pam 26-4, VA-Guaranteed Home Loans for Veterans (May 1987) [hereinafter VA Pam 26-41

[7]Dep't of Veterans' Affairs, Pam 26-7, Lender's Handbook, Guaranty of Insurance of Loans to Veterans, para. B-1. (Sept. 15, 1977) [hereinafter VA Pam 26-71.

[8]Wartime service includes World War II (September 16, 1940, to July 25, 1947); Korean Conflict (June 27, 1950 to January 31, 1955); or Vietnam Conflict (August 5, 1964, to May 7, 1975).

connected disability may be eligible even if they were on active duty less than ninety days.

Time served on active duty for training in the Reserve components does not qualify for VA home loan eligibility purposes. Moreover, active-duty training in the National Guard does not count unless the member was activated for federal service. World War I veterans generally are not entitled to participate in the home loan guaranty program.

Dependents of certain service members also may be eligible for VA home loans. Surviving spouses of eligible service members who died as the result of service-connected injuries are eligible for VA financing. Spouses of active duty members who are carried in missing-in-action or prisoner-of-war status for more than ninety days also may qualify.[9]

To obtain VA financing, service members meeting the eligibility criteria must obtain a certificate of eligibility from the VA.[10] Issuance of a certificate of eligibility does not, however, constitute approval of a loan by the VA.

B. ENTITLEMENT

The guaranty program enables veterans to obtain home mortgages through conventional sources without making a substantial down payment." Congress recently enacted a new tiered entitlement system that applies to all loans taken out after January 1, 1990.[12] The current basic entitlement, or loan guaranty amount, is $36,000. This

[9] 38 U.S.C. § 1801(a)(3) (1988).

[10] Eligible applicants should submit a completed VA Form 26-1880, Request for Determination of Eligibility and Available Loan Guaranty Entitlement, along with copies of all discharge or separation documents showing dates of service. Applicants on active duty should submit a statement of service signed by an adjutant, personnel officer, or commander of the member's unit. This statement should show date of entry on active duty and the dates of any time lost.

[11] The Supreme Court has characterized the guaranty provisions of the program as "the substantial equivalent of a down payment in the same amount [of the entitlement]." *Shim*, 367 U.S. at 383.

[12] The Veterans' Home Loan Indemnity and Restructuring Act of 1989, Pub. L. No. 101-237, § 306, 103 Stat. 2069 (1989) [hereinafter 1989 Act]. The new law specifies that for loans between $56,250 and $144,000, the guaranty amount is $36,000 or 40% of the loan. For loans between $56,250 and $45,000 the maximum loan guaranty amount is $22,500. If the loan is under $45,000, the VA will guarantee 50% of the loan. The current guaranty amount for manufactured homes and lots is 40% or $20,000, whichever is less. 38 U.S.C. § 1810(c) (1988).

amount may be increased to $46,000 or forty percent of the loan, whichever is less, if the amount of the loan exceeds $144,000.

Mortgage lenders traditionally allow qualified veterans to take out loans worth four times the guaranty amount without down payment. Accordingly, veterans may be able to obtain VA-guaranteed mortgages of up to $184,000 without down payment.[13]

Veterans may have some portion of their eligibility remaining even if they have guaranteed loans outstanding. Because the basic entitlement has risen over the last few years, veterans who previously have used their entitlement generally will have partial entitlement remaining. For example, a veteran who used all of the 1985 entitlement amount of $27,500 to purchase a home in 1985 may now have $18,500 of entitlement guaranty remaining if the veteran takes out a loan in excess of $144,000.[14]

Although a veteran is allowed only one entitlement, it may be restored under two conditions. The entitlement will be restored when the property subject to the VA loan has been sold and the loan paid in full. A veteran also may receive restoration of entitlement by allowing a qualified veteran to assume the VA loan and substitute his or her entitlement.[15] The veteran must apply for the restoration and receive approval of the VA.[16]

C. QUALIFYING PURPOSES

Although the primary purpose of the home loan program is to enable veterans to buy homes, it may be used for certain other qualifying purposes. A VA loan may be used to purchase or construct

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[13] Many mortgage lenders may, however, be reluctant to grant loans up to this amount until the Government National Mortgage Association (Ginnie Mae) decides to buy the loans on the secondary market. The association recently has incurred significant losses because of the high foreclosures on VA-guaranteed properties and therefore is taking a cautious approach to the increased entitlement. A compromise being considered will require veterans taking out loans over $144,000 to make a small downpayment. *With Increase in VA Loan Guarantee: Shop Around*, The Army Times, Jan. 1, 1990, at 4.

[14] The basic entitlement for all veterans remains at $36,000. The amount will increase to $46,000 only if a veteran takes out a loan in excess of $144,000. Thus, the partial entitlement under the facts given will be $8500, unless the veteran's new loan amount exceeds $144,000.

[15] The buyer must meet the occupancy, and income and credit requirements of law. *See generally* VA Pam 26-7.

[16] Restoration of entitlement should be requested by completing VA Form 26-1880 and forwarding it to any VA regional office.

residential property of up to four family units, including townhouses, condominiums, or mobile homes.[17] The VA loan also may be used to repair, improve, or alter an existing home.[18] The VA home loan program may not be used to purchase property in a foreign country,[19] to buy business property, or to buy a cooperatively owned apartment.[20]

Veterans must certify that they intend to occupy the property securing the VA loan as a home.[21] A recent amendment to the law, however, provides an exception to the occupancy requirement for a veteran who is unable to occupy the property due to military service if the veteran's spouse certifies that he or she will occupy the home.[22]

The loan guaranty entitlement may be used to obtain refinancing to make alterations, repairs, or improvements to the property. The amount of the refinanced loan may not, however, exceed an amount equal to ninety percent of the fair market value of the dwelling.[23] The VA will not guarantee any loan for improvement or refinancing of a dwelling unless the veteran certifies that he or she occupies the property as a home.[24] Veterans will be entitled to VA financing, however, if they are unable to occupy the residence due to military service and the veteran's spouse occupies the dwelling.[25] Another exception allows veterans to certify that they intend to reoccupy a residence after improvements are made to the property.

Veterans also may use a VA loan to refinance an existing home loan, a manufactured home loan, or a prior VA loan to take advantage of a lower interest rate.[26] These loans must satisfy five requirements: 1)the loan must be secured by the same dwelling as the loan being refinanced; 2) the veteran must own the dwelling and either occupy

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[17]The loan also may be used to huy a lot upon which to place a mobile home. 38 U.S.C. § 1810(a)(1) (1988).

[18]*Id.* § 1810. Weatherization improvements also qualify.

[19]38 C.F.R. § 36.4214, ch. 1 (1988). The property must be located in the United States or its possessions, including Puerto Rico, Guam, Virgin Islands, American Samoa, and Northern Mariana Islands.

[20]The requirement that all members of the cooperatively owned apartment must be veterans using their entitlement and statutory lien requirements have presented insurmountable obstacles to obtaining VA financing for cooperative apartments. VA Pam 26-4.

[21]38 U.S.C. § 1804(c)(1) (1988).

[22]*Id.* § 1804(c)(2); 38 C.F.R. § 36.4303.

[23]38 U.S.C. § 1810(e)(1) (1988); 38 C.F.R. part 36 § 36.4306 (1988).

[24]38 C.F.R. § 36.4303 (1988).

[25]*Id.* § 36.4303.

[26]38 U.S.C. § 1810(a)(8), (9)(B)(i) (1988): 38 C.F.R. § 36.4306(a) (1988).

or have previously occupied the dwelling, **3)** the amount of the VA guaranty must not exceed the existing balance and certain closing costs; **4)** the amount of the VA guaranty may not exceed the original guaranty; and **5)** the term of the new loan may not exceed the original loan plus ten years.[27]

Guaranteed loans to purchase manufactured homes and lots also are available.[28] Recent amendments to the loan program have changed the entitlement amount, guaranty calculation, and occupancy requirements of these loans.

D. VA FINANCING REQUIREMENTS

Veterans obtain a VA-guaranteed loan from private commercial lenders.[29] The VA imposes several conditions on the financing arrangement between the private lender and the veteran purchaser. A common misconception is that all lenders must accept VA-guaranteed financing. Lenders may refuse to participate in the VA home loan guaranty program and many often do. On the other hand, the VA may prevent private lenders from participating in the home loan program if they do not comply with VA procedures or if they take action detrimental to the government's interests.[30]

Lenders who choose to participate may not charge any points to a veteran purchaser, but they may charge a one-percent loan origination fee.[31] The loan origination fee may be included in the amount of the loan and paid from its proceeds.[32] The veteran also may be required to pay appraisal fees, recording fees and taxes, credit report costs, tax assessments, survey expenses, and title examination fees.[33]

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[27] 38 U.S.C. §§ 1810(e)(1), 1812(a)(4)(A) (1988); 38 C.F.R. § 36.4306a (1988).

[28] 38 U.S.C. § 1812(a)(1) (1988). The loan may be used to purchase a lot on which to place a manufactured home, to purchase a manufactured home, or to refinance an existing loan that was made for the purchase of, and secured by, a manufactured home. The loan also may be used to cover the costs of preparing the lot for use as a site for a manufactured home, including paving and installing utility connections even if the veteran already owned the lot. *Id.* § 1812(a) *(2);* 38 C.F.R. § 36.4251 (1988).

[29] The VA also administers a direct home loan program. 38 U.S.C. § 1815 (1988). This article will not address the direct home loan program.

[30] *Id.* § 1804(d).

[31] *Id.* § 1829; 38 C.F.R. § 36.4254(b) (1988). Because this point does not represent prepaid interest, it is not deductible as an itemized interest deduction on an individual federal income tax return. The point, however, may be treated as an addition to basis to reduce recognized gain when the property is sold. The point may not be assessed against a veteran receiving disability compensation or against eligible surviving spouses of veterans who died with a service-connected disability. 38 U.S.C. § 1829 (1988); 38 C.F.R. § 36.4254(d)(2) (1988).

[32] 38 U.S.C. § 1829(a) (1988).

[33] 38 C.F.R. § 36.4254 (1988).

The veteran also must pay a funding fee to the lender when receiving a VA-guaranteed loan. This funding fee will be credited to the VA's Guaranty and Indemnity Fund and used to satisfy any losses that the VA may incur when paying on its guaranty in the event of default.[34] The amount of the fee is based on the downpayment made by the veteran. If the veteran does not make a downpayment, the fee is 1.875% of the loan; if the downpayment is 5%, the fee is 1.375%; and if the downpayment exceeds 10% of the loan the fee is 1.125%.[35] Although the VA does not require any type of downpayment, nothing precludes the lender from requiring one. Payment of all purchaser closing costs must be in cash. No mortgage insurance premium is involved in VA home loans. Lenders may not impose any prepayment penalties on the loans, and the loans must be assumable.

Most loans guaranteed by the VA are fixed-rate mortgages. The VA, however, will guarantee graduated mortgage or growing equity mortgage plans. The loan repayment for any type of mortgage may not extend beyond thirty years and thirty-two days.[36]

The VA establishes, in coordination with the Department of Housing and Urban Development, the rate of interest that the veteran must pay for the mortgage loan.[37] This rate is adjusted from time-to-time to keep pace with market conditions, but once the loan is made, the interest rate remains fixed for the life of the loan. Unlike most conventional loans, the interest rate charged on VA loans is based on the rate at the time of closing. Thus, veterans are exposed to the risk that the interest rate may rise after the loan has been approved. During inflationary periods, veterans can avoid this risk by taking advantage of a procedure that allows them to lock in the interest rate at the time of loan approval.[38]

The interest rate set by the VA is typically below the conventional loan interest rate. To make up for this difference, the lender will assess points against the seller. No limit exists to the number of points that may be charged to the seller, and they actually must be paid by the seller. A state court recently held, however, that the VA regula-

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[34] 1989 Act § 1826.

[35] *Id.* § 1829. These amounts reflect a .625% increase effective for all loans taken out after 1 November 1990. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508. § 8004 (1990).

[36] 38 U.S.C. § 1803(d)(1) (1988). Loans exceeding five years must be amortized.

[37] *Id.* § 1803(c)(1); 38 C.F.R. § 36.4212 (1988).

[38] The procedure for "locking in" an interest rate is explained in VA Circular 26-84-16 (May 1, 1984). The procedure may vary depending on whether the loan is an automatic loan or a prior approval loan.

tions did not prohibit the seller from making an agreement with the buyer that the buyer will pay any points charged.[39] Another common practice is for the parties to agree to an increase in the home price or to overprice items of personal property to make up the amount the seller must pay in points.

All homes securing VA loans must meet VA standards for construction and general acceptability.[40] This requirement, along with the obligation to pay all points for obtaining the loan, makes VA financing less attractive to prospective home sellers than conventional financing. New homes must carry a one-year builder warranty that the home has been constructed in general conformity with VA approved plans and specifications. By guaranteeing the loan and establishing construction standards, however, the VA does not warrant the veteran's house.[41]

E. ASSUMPTION OF VA LOANS

Because VA-guaranteed loans do not carry a "due on sale" clause or prepayment of mortgage penalties, they are assumable.[42] Although this is an attractive feature of the program, it led many veterans down the path to financial disaster. Prior to 1988, virtually no restrictions existed on who could assume VA-guaranteed loans. The high rate of defaults on VA assumed loans has led Congress to enact restrictions on loan assumptions in the Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987.[43] The 1987 law restricts the assumability of VA-guaranteed loans for which commitments were issued on or after March 1, 1988. Under the new law, a lender may allow a buyer to assume a VA loan only if three criteria are satisfied: 1) the loan must be current; 2) the buyer must be found creditworthy; and 3) the buyer must be obligated by contract to purchase the property and assume full liability for repayment of any unpaid balance.[44] If all three criteria are met, the veteran is released from all liability to the VA on the assumed loan.

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[39] Ganey v. Doran, 236 Cal. Rptr. 787 (Cal. Ct. App. 1987).

[40] The minimum property requirements are set forth in VA Pam 26-7. Individuals who are planning to sell their homes should become familiar with these standards before agreeing to accept VA financing in a contract for sale.

[41] Potnick v. United States, 356 F. Supp. 395 (N.D. Miss. 1973).

[42] 38 C.F.R. §§ 36.4275, 36.4310 (1988).

[43] 38 U.S.C. § 1814 (1988). The changes made to the loan program by the Act were discussed in TJAGSA Practice Note, *Changes Made to VA Home Loan Program,* The Army Lawyer, May 1988, at 52.

[44] 38 U.S.C. § 1814(a)(1) (1988).

The new law contains provisions for appealing to the Secretary a determination not to allow a buyer to assume a loan. The Secretary has the authority to approve the assumption of the loan if all three criteria have been met. Moreover, even if the buyer does not qualify from a credit standpoint, the Secretary may approve the assumption if the transferor is unable to make payments on the loan and has made reasonable efforts to find a qualified buyer.[45]

The lender may charge either the purchaser or the seller of property a fee not to exceed the lesser of $300 and the actual cost of required credit reports or a maximum charge prescribed by state law. Additionally, a fee of one-half of one percent of the loan balance must be paid to the VA by the person assuming the loan.[46]

The penalty is stiff for attempting to circumvent the provisions of the new law by agreeing to private financing arrangements. Under the new law, a lender holding a VA loan may demand immediate and full payment of principal and interest if residential property secured by a guaranteed VA loan is transferred without notifying the lender.[47]

Certain transfers will not trigger the right of a lender to accelerate payments. A holder may not accelerate a loan in any of the following circumstances: the creation of a lien subordinate to the lender's security instrument; the transfer upon the death of a joint tenant; the transfer to a relative upon the death of the owner; the granting of a leasehold interest under three years without an option to purchase; the transfer to a spouse or children in joint tenancy; or the transfer to a spouse incident to a divorce.[48]

The new restrictions on VA loans will help many veterans avoid financial hardships by releasing them from liability on assumed loans. The stringent underwriting requirements and the assessment of assumption fees, however, will reduce the flexibility that veterans formerly enjoyed in allowing buyers to assume their VA loans. To ensure that borrowers receive notice of the new restrictions, lenders must include a conspicuous warning in loan instruments that VA loans are not assumable without the approval of the VA or its agents.

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[45] *Id.* § 1814(a)(4)(B).

[46] 38 C.F.R. § 36.4312(e)(2) (1988). The assumption fee is one percent of the total loan amount if the home securing the VA loan is a manufactured or mobile home

[47] 38 U.S.C. § 1814(b) (1988).

[48] 38 C.F.R. § 36.4308(c)(1) (1988).

IV. DEFAULT ON A GUARANTEED LOAN

A. *RIGHTS OF THE VA UPON DEFAULT*

A number of procedural safeguards apply upon the default of a VA-guaranteed loan to protect fully the interests of the VA and the other parties involved. Holders are required to provide timely notice to the VA upon the default of any guaranteed loan.[49] The holder of a VA-guaranteed loan may not take action to terminate the debtor's rights on the property until thirty days after delivery of notice to the VA of intention to take action.[50]

After receipt of the notice, the VA has the right to either pay on its guarantee and be subrogated to the rights of the lender to that amount[51] or pay the unpaid balance of the loan and receive an assignment of the loan and security interest.[52] These discretionary provisions are designed for the benefit of the VA, not the veteran, and are not subject to judicial review.[53] Accordingly, the veteran cannot compel the VA to pay the mortgagee the unpaid balance and take assignment.[54]

The holder on a VA guaranteed loan also must provide notice to the Secretary before commencing legal action or beginning foreclosure proceedings. The VA has thirty days to decide whether to pay the holder the unpaid balance of the obligation and receive an assignment.[55] If the holder commences legal proceedings to foreclose on the loan, it must provide copies of all documents and pleadings to the VA.[56] Copies of notice of sale under a power of sale must be furnished to the VA at least fifteen days prior to sale.[57] During this time, the Secretary may inform the holder how it should proceed to preserve the personal liability of the parties.[58]

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[49]18 U.S.C. § 1832(a)(1) (1988). The notice shall be within 15 days after the debtor has missed two full installment payments on the loan. 38 C.F.R. § 36.4280 (1988).

[50]38 C.F.R. § 36.4280(e) (1988). Such action would include sale under power of sale, repossession, loan acceleration, or commencement of judicial proceedings. Immediate action may be taken by the holder if the debtor has abandoned the property or extreme waste would result from forbearance.

[51]38 U.S.C. § 1816 (1988).

[52]*Id.*

[53]Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1982).

[54]Gatter v. Nimmo, 672 F.2d 343 (3d Cir. 1982).

[55]38 U.S.C. § 1816(a)(2) (1988).

[56]38 C.F.R. § 36.4282 (1988).

[57]*Id.*

[58]*Id.*

Upon receipt of notice of judicial sale or sale under power of sale, the VA has the right to specify a minimum bid price. If the foreclosure sale does not generate a selling price to satisfy the amount of the loan, the VA will pay the lender the difference between the selling price and the amount of the loan up to the amount of the loan guaranty.[59] After payment of the guaranty amount, the VA is subrogated to the contract and the rights of the holder to the extent paid. The VA has two alternatives to recover money paid under the guaranty. First, it may pursue any causes of action the lender had against the veteran.[60] Secondly, the VA may proceed directly against the veteran for the amount paid on the guaranty pursuant to an independent right of indemnification.[61]

The statutory and regulatory provisions give the VA extensive rights upon default of a guaranteed loan. The VA in most cases will have the option of selecting foreclosure methods by means of subrogation to the holder's rights, taking assignment of the loan and the security, or providing direction to the holder on how to best proceed.

One alternative open to the VA available upon default is known as "refunding." Under this program, the VA, prior to commencement of foreclosure proceedings, pays the lender the unpaid portion of the veteran's loan and the lender assigns its interest and security in the loan to the VA.[62] The veteran then makes monthly payments directly to the VA until the loan is satisfied. The veteran must be able to establish an ability to repay the loan and a decision by the VA not to refund a loan is not judicially reviewable.[63]

B. REPRESENTING THE VETERAN IN DEFAULT

The veteran who obtains a VA loan remains liable for default on the note despite the existence of a VA guaranty. Accordingly, veterans should make every effort to keep payments current to avoid the negative consequences associated with foreclosure, such as personal liability for any deficiency upon foreclosure and a blemish on their

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[59] *Id.* (setting forth the method **for** determining the amount of the guaranty payment to the holder under these circumstances).
[60] 38 U.S.C. § 1832 (1988); 38 C.F.R. § 36.4323(a) (1989).
[61] 38 C.F.R. § 36.4323(e) (1989).
[62] 38 U.S.C. § 1816(a) (1988); 38 C.F.R. § 36.4318 (1988).
[63] Fitzgerald **v.** Cleland, 498 F. Supp. 341 (D. Me. 1980).

credit standing.[64] If veterans cannot make required payments, they should attempt to avert foreclosure by selling the mortgaged property themselves, because foreclosure sales rarely generate enough proceeds to satisfy the total indebtedness.

In many cases, the veteran can avoid default merely by cooperating with the lender. Veterans encountering financial difficulties should contact the lender immediately to work out a satisfactory resolution. For example, the veteran may convince the lender to reamortize the loan into a more manageable payment schedule. Although the VA encourages participating loan servicers to exercise "all reasonable forbearance in the event a borrower becomes unable to meet the terms of a loan,"[65] it does not have the authority to compel the lender to make an accommodation for the veteran. Accordingly, the holder has broad discretion to extend or modify loan repayment terms, accept partial payment, and apply prepayment to cure a default.[66]

Veterans encountering financial difficulties also should seek counseling from the nearest VA regional office. Although the VA does not provide legal advice, financial counseling is available to assist veterans facing default.

New procedures, added in 1987, require the VA to contact the veteran upon receipt of notice of default and provide information and, to the extent possible, counseling to the veteran.[67] The VA should advise the veteran about alternatives to foreclosure, possible means of curing the default, and the rights and liabilities of the VA and the veteran in the event of default.[68] A veteran who can demonstrate financial stability may be able to convince the VA to take over the loan from the lender under the refund program.

If default on the loan is inevitable, the best solution under most circumstances is for the veteran to attempt to sell the property.

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[64] Dep't of Veterans' Affairs, Pam **26-5,** Pointers for the Veteran Homeowner (April **1987)** [hereinafter VA Pam **26-51** (provides good basic advice on methods available to avoid foreclosure).

[65] VA Pam **26-7,** para. F-1(b).

[66] *Id.* (guides lenders in the treatment of defaults).

[67] 38 **U.S.C. § 1832(a)(4) (1988).** The VA has been carrying out this responsibility by notifying the veteran by letter and advising the veteran to contact the agency. The letter also lists the alternatives available to the veteran to avoid foreclosure, including paying the delinquency, working out an agreement with the lender, applying for payment assistance from state and local governments, making a private sale, entering into a compromise agreement with the VA, and participating in the VA refunding program.

[68] *Id.*

Unless the property has depreciated in value since purchase, the veteran should be able to recover enough from the sale to pay off the loan in full and avoid the negative consequences associated with foreclosure. Veterans should not, however, convey their property before obtaining legal advice because a number of real estate "scams" exist that prey on veterans who have defaulted on their loans. Although not required, the veteran should notify the VA of any impending sale.

A VA loan compromise program may provide some veterans with an opportunity to eliminate or reduce substantially financial losses associated with loan terminations.[69] The theory behind the compromise agreement program is that all parties involved benefit when a veteran avoids loan foreclosure by selling the property. To encourage the sale of mortgaged property, the VA will refinance the amount of the loan balance remaining after the sale of the home.

The compromise agreement should be considered when, as a result of a decline in real estate values, a veteran is unable to sell a home for a price sufficient to cover the amount of a loan balance. The program also may be used when delinquent interest increases the loan balance above the fair market value of the property.

To participate in the program, the veteran must find a buyer willing to purchase the property for its fair market value. The selling price also must be less than the outstanding balance on the original loan. A copy of the sales contract, a recent property appraisal, and other documents should be submitted to the VA along with a request to enter into a compromise agreement.[70] If the VA approves the request, it will pay all or part of the remaining balance and enter into a financing agreement for the amount paid. The veteran must agree to remain liable for the amount of the claim the VA is required to pay the lender. The new debt can be financed for up to thirty years at an interest rate as low as four percent. Once this debt is paid off. the veteran's VA loan eligibility will be restored.

Another solution might be far the veteran to convince the lender to accept a deed in lieu of foreclosure. This procedure is recognized

[69] The Compromise Agreement Program is described in VA Loan Guaranty Letter *So.* 87-49, Nov. 17, 1987.

[70] The following information should be submitted to the local VA regional office having jurisdiction over the loan: a copy of the sales contract; a statement of loan account as of the estimated closing date: estimates of all costs expected to be incurred with the transaction: a property appraisal: a release of liability package if the loan is to be assumed: and a Veteran's Statement and Agreement of Liability to the VA.

in almost every state and will release the veteran completely from liability on the VA loan. The VA has a longstanding policy to encourage holders to accept a voluntary conveyance in lieu of foreclosure because it saves liquidation expenses and time.[71] This procedure is, however, discretionary on the part of the VA and will be approved only if it is in the VA's best interests to do so. A disadvantage of offering a deed in lieu of foreclosure from the veteran's perspective is that it may generate increased federal income tax liability to the extent of loan forgiveness.[72]

A veteran may have some administrative alternatives to escape or reduce liability after collection on a deficiency has begun. The VA must release a veteran from liability on any defaulted loan if the collection of "indebtedness would be against equity and good conscience."[73] The agency may not grant a waiver if it finds that the veteran is guilty of fraud, misrepresentation, or bad faith in connection with the request for waiver.[74]

Veterans also may consider applying for a VA compromise agreement to minimize the financial hardship associated with repayment of the loan balance. Under this program, the VA may agree to finance a remaining deficiency at a favorable interest rate.

The new law enacted by Congress in 1989 will go a long way toward alleviating hardships upon default for those veterans who take out loans after January 1, 1990. Under the new law, veterans who pay a VA funding fee will not be liable to the VA for any deficiency upon default except in case of "fraud, misrepresentation, or bad faith" by the veteran in obtaining the loan or creating the default.[75]

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[71] VA Pam 27-6.

[72] I.R.C. § 61(a)(12) (1988). The taxpayer must include the difference between the principal outstanding and the settlement amount as gross income. *See* generally DiLaura v. Commissioner, *53* T.C.M. (CCH) 1077 (1987); Juster v. Commissioner, 53 T.C.M. (CCH) 1079 (1987).

[73] 38 U.S.C. § 3102(b) (1988), as *amended* by 1989 Act § 311. The 1989 Act removed the discretion from the administrator to grant the waiver upon a finding that collection of the debt would be against equity and good conscience. The veteran should request a waiver of collection of indebtedness in writing from the office that notified the veteran of the indebtedness. The written request should include an explanation of why the veteran was not at material fault in creating the indebtedness and how repaymenl would cause undue financial hardship. Veterans should file a completed VA Form 4-5655, Financial Status Report, along with the reauest for waiver.

[74] 38 U.S.C. § 3102(c) (1988), as *amended* by 1989 Act § 311.

[75] 1989 Act § **304.**

C. DEFAULT ON AN ASSUMED LOAN

A disturbingly large percentage of defaults on VA-guaranteed loans have occurred on assumed loans. Veterans who have allowed others to assume their VA loans generally will be held liable on the loan unless they have received a release from liability from the VA at the time of the assumption. Nevertheless, several administrative alternatives may be available to a veteran who has not secured a release of liability on an assumed loan.

The VA has the discretion to release a veteran from liability on an assumed loan even after default has occurred if the agency would have issued a release of liability had the veteran applied for a release at the time of the assumption. To obtain this retroactive release of liability, the veteran must establish that the loan is current, that the transferee is legally liable for the full amount of the debt, that the transferee has assumed all contract obligations, and that the transferee is a satisfactory credit risk.[76]

The determination of whether a transferee is a satisfactory credit risk can be made by a retroactive credit report showing the transferee's income, obligations, and credit history at the time of the transfer.[77] A transferee generally will be considered a satisfactory credit risk if no record of loan default existed within the first twelve months of the transferee's acquisition of the property.[78] If the property was transferred to more than one person, the veteran need only establish that one of them was a satisfactory credit risk. Internal VA guidance provides that doubtful cases should be resolved in favor of releasing the veteran.[79]

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[76] 38 U.S.C. § 1813(b) (1988); 38 C.F.R. § 36.4323 (1988). To satisfy the second requirement, the contract for sale should contain the purchaser's express agreement to assume and pay the VA guaranteed loan. Moreover, the contract also should include a nonmerger clause to avoid the doctrine of merger. It is also good practice to include the covenant to assume and pay the VA loan in the warranty deed. Finally, language also should be included reflecting that the transferee expressly assumes the indemnity liability to the VA in accordance with 38 C.F.R. § 36.4323(e) (1988).

[77] VBA Manual M-26-3, § 5 (Sept. 26, 1988) [hereinafter VBA Manual 26-3]; *see also* DVB Circular 26-72-38 (Nov. 22, 1972).

[78] VBA Manual M-26-3, § 5. Even if a record of loan default is present within the first 12 months, the transferee will be considered a satisfactory credit risk if the default was due to economic recession, unemployment, disaster, or other conditions beyond the transferee's control. VA guidance provides, however, that unusual circumstances must exist to warrant releasing the veteran when the transferee defaults within a short time following transfer.

[79] *Id.*

Even if the VA grants a release from liability, the lender still may seek recovery from the veteran for any deficiency unless the veteran-borrower previously obtained a release from the lender. If the retroactive release of liability procedure is unavailable or if a request has been disapproved, the veteran should contact the transferee and attempt to work out a solution that will protect the veteran's interest. One alternative might be for the parties to work out an agreement to reinstate the loan or sell the property to a third party. Another possibility would be to convince the transferee to deed back the property to the veteran and then pay off the delinquent payments. The parties also may be able to convince the lender and the VA to accept a deed in lieu of foreclosure.

Veterans who have allowed others to assume their loans also may take advantage of the compromise agreement program to minimize financial hardship upon loan termination. The veteran should work out an agreement with the buyer to retake possession of the home, make all overdue payments, and then attempt to sell the home. After receiving an offer to purchase the home for fair market value, the veteran then should request the VA to approve a compromise agreement.

D. APPEALING AGENCY DECISIONS

Veterans receiving adverse determinations on requests for relief may be able to appeal to the Board of Veterans' Appeals, the newly established Court of Veterans' Appeals (COVA), or federal courts. The Board of Veterans' Appeals (BVA) has jurisdiction to review determinations by the Secretary of Veterans' Affairs on all "questions on claims involving benefits under the laws administered by the [Department of Veterans' Affairs]."[80] Regulations clearly indicate that the BVA has jurisdiction to consider appeals involving basic eligibility for guaranteed home loans and waivers of loan guaranty indebtedness.[81] No specific statutory or regulatory provision gives the BVA appellate jurisdiction over decisions such as agreeing to a refunding program, taking a loan assignment, or granting a release of liability. Veterans, nevertheless, may attempt to appeal adverse determinations in these areas claiming that they fall well within the Board's general grant of jurisdiction.

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[80] 38 C.F.R. § 19.2 (1988); ***see*** *also* 38 U.S.C. § 4004 (1988).
[81] 38 C.F.R. § 19.2 (1988).

Decisions by the BVA now may be appealed to the newly created Court of Veterans' Appeals.[82] Appellants must file a notice of appearance with COVA within 120 days of the BVA decision.[83] Review by the COVA will be based on the record as it existed before the BVA. After the court issues a decision, either the veteran or the VA can appeal to the United States Court of Appeals for the Federal Circuit.[84]

Whether the new appeals procedure will broaden the role of federal courts in reviewing VA determinations remains to be seen. Historically, veterans have not been successful in convincing federal courts to review VA decisions. Several veteran-plaintiffs have sought review of internal agency decisions under the Administrative Procedure Act. Other veterans have brought private causes of action against the VA for damages for failure to implement programs designed to avoid foreclosure. These efforts consistently have been rejected by the courts.

A long line of cases has reached the conclusion that VA decisions on how to proceed upon default of a guaranteed loan are matters committed to agency discretion and not judicially reviewable under the Administrative Procedure Act.[85] Courts in these cases have concluded that the statute establishing the loan guaranty program grants the VA such broad discretion that the "committed to agency discretion" exception in the Administrative Procedure Act applies.[86] These courts have rejected the assertion that internal VA manuals and publications furnish sufficient guidance to courts to test whether the agency has abused its discretion.

Courts also have been consistent in ruling that veterans do not have an implied private right of action in federal court to enforce duties the VA or lenders might have pursuant to VA publications. In a lead case in this area, *Simpson* v. *Cleland*,[87] a veteran sued the VA after his guaranteed mortgage had been foreclosed, alleging that the

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Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended at 88 U.S.C. §§ 4001-4099 (1988) [hereinafter 1988 Act].

[83]38 U.S.C. § 4066.

[84]*Id.* § 4092. Decisions of the Federal Circuit are subject to review by the U.S. Supreme Court.

[85]5 U.S.C. § 701(a)(2)(1976) (1988) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." ***See,*** *e.g.*, Gatter v. Nimmo, 672 F.2d **343** (3d Cir. 1982); Fitzgerald v. Cleland, 498 F. Supp. 341 (D. Me. 1980).

[86]*Gatter*, 672 F.2d at 345.

[87]640 F.2d 1354 (D.C. Cir. 1981).

failure of the VA to take any action to avoid foreclosure was the cause of the damages he incurred. The District of Columbia Circuit refused to imply a cause of action based on internal agency regulations and could find no statute or legislative history that would serve as a basis for an implied or express right of action against the VA.

Until recently, veterans have not been successful in obtaining post-foreclosure judicial relief from the VA as well. For example, the agency's nonimplementation of a mortgage refunding program was held in *Gatter v. Cleland*[88] to be a matter within agency discretion and thus not subject to judicial review. In *Rank v. Nimmo*[89] several plaintiff-veterans sued the VA after their homes were foreclosed because the VA refused to implement the assignment program in the entire Los Angeles area. The court, following *Simpson*, concluded that no implied cause of action exists under federal law against the VA or the lender for failure to help a veteran avoid default. This conclusion coincided with a number of other cases that have held that provisions in VA regulations and the loan servicing manual create no rights for the veteran that can be asserted in defense of a foreclosure action.[90]

A recent case, *United States* v. *Church*,[91] may offer some hope for veterans seeking judicial review of adverse postforeclosure VA determinations. In *Church* a veteran contended that the VA's denial of his waiver of indebtedness constituted a "legal wrong" within the meaning of the Administrative Procedure Act.[92]

The VA argued that the decision to release a veteran from his or her obligation under the home loan guaranty program is committed to the sole discretion of the VA and therefore is unreviewable under the "committed to agency discretion" exception to the Act.[93] The court in *Church* rejected this argument by noting that federal statute does not give the Administrator of the VA unbridled discretion to

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[88]512 F. Supp. 207 (E.D. Penn. 1981).

[89]677 F.2d 692 (9th Cir. 1982), ***cert. denied,*** 459 U.S. 907 (1982).

[90]*See, e.g., Gatter*, 672 F.2d at 343; Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir. 1981); United States v. Harvey, 659 F.2d 62 (5th Cir. 1981).

[91]736 F. Supp. 1494 (N.D. Ind. 1990).

[92]5 U.S.C. § 702. This provision of the Act provides that "[a] person suffering legal wrong because of agency action,. . . **is** entitled to judicial review thereof." The veteran claimed he was entitled to the waiver because the VA intercepted his federal income tax return to pay off a deficiency on his loan after the Wisconsin VA had made assurances to him that he would not be personally liable. Based on these assurances, the veteran made no attempt to redeem the property or to participate in the foreclosure action.

[93]5 U.S.C. § 701(a)(2).

grant a waiver, but rather, "requires him to act in a certain way upon the finding of certain facts."[94] Thus, the court concluded that it could review the facts based on this clear standard and determine whether the Administrator was required to grant the waiver.[95]

Moreover, veterans could find the door to judicial review open by pursuing denials through new agency channels. Veterans now have the right to appeal denials of waivers of indebtedness to the BVA, the COVA, and ultimately, to the federal courts. Whether this avenue will clear the way completely for judicial review of agency determinations, which formerly had been considered discretionary with the agency, is not entirely clear. Despite the new procedures, veterans may find that some determinations, such as the denial of a retroactive release of liability or the decision not to take assignment of a loan, remain outside the scope of judicial review.

IV. REPRESENTING THE VETERAN DURING FORECLOSURE

A. *RIGHTS UNDER STATE LAW*

A veteran may be able to defend successfully a foreclosure suit or action on a deficiency after foreclosure by taking advantage of provisions of state or federal law. Most state laws continue the historical trend of protecting the mortgagors from mortgagees and avoiding forfeitures.[96] Thus, the laws in many states impose strict procedural requirements on mortgage foreclosures, specify limited avenues for foreclosing on secured property, and curtail the ability of mortgagees to bring actions to recover deficiencies after foreclosure. Veteran-mortgagors have attempted to use these state laws to defend against foreclosure and deficiency actions brought by the VA.

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[94] *Church,* 736 F. Supp. at 1500. The statute, 38 U.S.C. § 3102, requires the Secretary of the VA to waive payment of indebtedness to the VA when the Secretary determines that collection would be against equity and good conscience.

[95] *Id.* The court went on to find that the veteran was entitled to a waiver of indebtedness in the case.

[96] An excellent historical treatment of the law of mortgages is contained in Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosure*, 36 S.C.L. Rev. 461 (1986).

In *United States v. Shimer*[97] the United States Supreme Court considered whether the VA should be bound by the Pennsylvania Deficiency Judgment Act, which limited a mortgagee from recovering in a deficiency judgment unless the mortgagee obtains a court determination of fair market value of the mortgaged property. The Court held that, even though the VA failed to obtain the required court determination under state law, application of the state law in this context would be inconsistent with VA regulations that grant a right of indemnity to the VA. These regulations, the Court opined, provided an exclusive source of protecting the VA's rights as guarantor, and therefore, displaced inconsistent state law.

Following the rationale of ***Shimer,*** some lower federal courts have held that a federal common law permits the VA to seek indemnity against mortgagors despite the existence of inconsistent state law. Thus, in *Jones v. Turnage*[98] the court held that California's antideficiency law did not bar the VA from seeking indemnity against a veteran for the amounts the VA paid under its loan guaranty. The court agreed with the VA that a nationally uniform law would serve the national interest and avoid subjecting the loan guaranty program to the "vagaries of the various state laws which might control."[99] The Fifth Circuit reached a similar result in holding that Florida law barring antideficiency suits did not apply to the VA.[100]

Recently, however, lower federal courts have shown an increasing tendency to require the VA to comply with state law when pursuing its rights to foreclosure and indemnification.[101] For example, in *State v. Whitney*[102] the court held that VA regulations governing mortgage foreclosure did not displace New York law requiring notice to mortgagors. The court concluded that the New York law was not inconsistent with the protections afforded the lender under VA regulations. Accordingly, the court ruled that the VA could not recover a

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[97] 367 U.S. 374 (1961).

[98] 699 F. Supp. 795 (N.D. Cal. 1988). This decision should be compared with United States v. Stewart, 523 F.2d 1070 (9th Cir. 1975), in which the court held that the California antideficiency statute barred a VA deficiency claim when the agency foreclosed on a direct loan.

[99] *Id.* at 802 (citing United States v. Wells, 403 F.2d 596 (5th Cir. 1968)).

[100] United States v. Wells, 403 F.2d 596 (5th Cir. 1968); ***see also*** United States v. Spears, 859 F.2d 284 (3d Cir. 1988) (Farmers' Home Administration need not comply with two Pennsylvania statutes setting forth procedural rights for mortgagors).

[101] The Supreme Court has made clear that state law could be adopted as the federal common-law rule of decision governing federal agencies as long as application of state law will not frustrate specific objectives of the federal program. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

[102] 602 F. Supp. 722 (W.D.N.Y. 1985).

deficiency from the mortgagor on either a theory of subrogation or indemnity because it did not provide notice to the mortgagor as required under state law.

In a similar case, *United States* v. *Vallejo*,[103] a federal court held that the VA was barred from bringing a deficiency suit against a veteran because it elected to pursue foreclosure under power of sale and state law prohibited deficiency judgments following this action. The court rejected the VA's argument that federal, not state law, should be applied and held that the VA, like all other creditors pursuing a foreclosure, is bound by state antideficiency laws.[104] The court distinguished *Shimer* by pointing out that in *Shimer* a complete federal scheme clearly displaced inconsistent state law, whereas in this case the VA regulations contemplated that foreclosure actions would be conducted under applicable state law. According to the court, the appropriate analysis in cases in which federal law has not been displaced entirely by state law is to displace state law only when it is actually in conflict with federal law.[105] Following *Vallejo*, a federal district court permanently enjoined the VA from attempting to collect deficiency judgments against veterans if the mortgages were foreclosed nonjudicially under state law.[106]

In *Whitehead v. Derwinski*[107] the Ninth Circuit held that the State of Washington's statutory scheme allowing a creditor to judicially foreclose was consistent with federal regulations and applied to prevent the VA from seeking deficiency judgments against veterans after the agency had directed nonjudicial foreclosure. The court noted that the VA had complete control to choose between judicial foreclosure and to pursue its right to subrogation, or to elect nonjudicial foreclosure, resorting to its right of indemnity. According to the court, when state law provides an alternative to the VA to exercise its right of subrogation, the scheme is consistent with state law and will not be displaced by federal law.

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[103]United States v. Vallejo, 660 F. Supp. 535 (W.D. Wash. 1987).

[104]*Id.* at 538. The court pointed out that the VA elected to pursue foreclosure under power of sale and could have proceeded under judicial foreclosure procedures if it was interested in bringing a deficiency action. The holding in *Vallejo* was later construed to apply retroactively rip to the federal statute of limitations. Whitehead v. Turnage, 701 F. Supp. 795 (W.D. Wash. 1988).

[105]660 F. Supp. 537 (citing Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta. 458 U.S. 141 (1982)). A similar result was reached in Cnited States v. Ellis, 714 F.2d 953 (9th Cir. 1983)(mortgagor entitled to state redemption rights on a Farmers Home Administration loan).

[106]Whitehead v. Turnage, 701 F. Supp. 795 (W.D. Wash. 1988). The Department of Veterans' Affairs has appealed this case.

[107]904 F.2d 1363 (9th Cir. 1990).

A federal court in Minnesota reached a similar conclusion in *Wil v. Derwinski*.[108] In *Wil* a group of veterans brought a class action against the VA to challenge deficiency judgments entered against them following foreclosure by advertisement of their insured homes. In most of the cases, the homes were sold to assumptors who subsequently defaulted on the VA loans. The private lenders pursued foreclosure by advertisement under Minnesota law and the VA paid the lenders the full amount of the VA guaranty. The VA then sought deficiency judgments against each of the plaintiffs, claiming an independent right of indemnification. The plaintiffs contended that the Minnesota law, which prevents deficiency judgments after foreclosure by advertisement,[109] bans the VA's actions.

The court in *Wil* followed the Ninth Circuit decision in *Whitehead* to hold for the plaintiff-veterans. The court concluded that the VA clearly had the right to control the foreclosure proceeding and nothing in Minnesota law precluded the VA from exercising its control.

These cases show that the VA can be limited by state law during foreclosure and deficiency suits. Accordingly, veterans should not overlook potential remedies that might be available under state law when defending these actions, even if the VA is a party to the action. In every jurisdiction, mortgagors have the right after default to perform their obligation under the mortgage and have title to the property restored.[110] Historically, courts scrupulously have protected the mortgagor'srights of redemption against attempts to limit or curtail the right."' To take advantage of these redemption rights, however, mortgagors generally must pay the entire amount of the mortgage debt.

Mortgagees usually will resort to foreclosure proceedings to terminate the veteran's right of redemption. The acceleration clauses found in most modern mortgages give mortgagees the power to declare the entire mortgage debt due and payable. A veteran may be able to defeat a mortgagee's right to acceleration by arguing that the mortgagee has shown a consistent pattern of accepting late payments.[112] A number of states recently have enacted ''arrearages"

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[108] 742 F. **Supp.** 1039 (D. Minn. 1990).
[109] Minn. Stat. § 582.30(2) (1990).
[110] G. Nelson & D. Whitman, Real Estate Finance Law § 7.1 (2d ed. 1985) [hereafter Nelson & Whitman].
[111] *Id.* § 7.1.
[112] Scelza v. Ryba, 169 N.Y.S.2d 462 (N.Y. **Sup.** Ct. 1957); Edwards v. Smith, 322 S.W.2d 770 **(Mo.** 1959); Short v. **A.** H. Still Inv. Co., 206 Va. 959, 147 S.E.2d 99 (1966).

legislation that will allow a mortgagor to defeat acceleration by paying the default that existed prior to acceleration.[113] Ten states have statutes that allow a mortgagor an opportunity to pay all present and future installments due and thereby avoid foreclosure.[114] Under these reinstatement statutes, a veteran may be able to avoid acceleration of the loan and an ensuing foreclosure suit.

Veterans also may maintain that VA guidelines which extend the time that must elapse between default and foreclosure and require the mortgagee to allow reinstatement by payment of arrearages operate as a legal condition precedent to foreclosure. The current weight of authority is that these guidelines are advisory only and do not constitute grounds for enjoining a foreclosure.[115] A court in the exercise of its equitable powers, may rely on these guidelines, however, to limit or enjoin foreclosure if they have been ignored by the mortgagee.

To a large extent, a veteran's ability to defend a foreclosure action successfully will depend on the state in which the action is brought. The rights of a veteran differ if the state in which the foreclosure action is taken recognizes strict foreclosure, foreclosure by power of sale, or judicial foreclosure.

Only six states have strict foreclosure laws.[116] Under these laws, the mortgagee follows a procedure to terminate judicially the mortgagor's equity of redemption and become the owner of the land in satisfaction of the mortgage debt. No sale of the underlying property is required. Most states that recognize strict foreclosure give a mortgagor

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[113] Nelson & Whitman, *supra* note 110, § 7.7, at 491.

[114] Alaska Stat. § 09.45.070 (Supp. 1982); Ariz. Rev. Stat. Ann. § 33-813 (1956); Cal. Civ. Code § 2924c (West Supp. 1983); Ill. Ann. Stat. ch. 95, para. 57 (Smith-Hurd Supp. 1983-84); Minn. Stat. Ann. § 580.30 (West Supp. 1983); Miss. Code Ann. § 89-1-59 (Supp. 1982); Neb. Rev. Stat. § 76-1012 (1981); Pa. Stat. Ann. tit. 41, § 404 (Purdon Supp. 1983-84); Utah Code Ann. § 57-1-31 (1981); Wash. Rev. Code Ann. § 61.24.090 (1974). These statutes provide, however, that in addition to curing the default, the mortgagor must pay the holder's costs in proceeding to foreclosure.

[115] *See, e.g.*, Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Encarnacion Hernandez v. Prudential Mortgage Co., 553 F.2d 241 (11th Cir. 1977); Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974); Nesmith v. Lynn, 377 A.2d 352 (Del. 1977).

[116] Conn. Gen. Stat. Ann. § 49-17 (West 1978); Me. Rev. Stat. Ann. tit. 14, § 6201 (1980 & Supp. 1983-84); Mass. Gen. Laws Ann. ch. 244, § 1 (West 1959); N.H. Rev. Stat. Ann. § 479:26 (1983); Vt. Stat. Ann. tit. 12, § 4528 (1973); Great Lakes Mortgage Corp. v. Collymore, 14 Ill. App. 3d 68, 302 N.E.2d 248 (1973). Several other states provide for strict foreclosure under special circumstances. *See generally* Nelson & Whitman, *supra* note 110, § 7.9.

time in which to redeem!"[117] Mortgagees that have elected strict foreclosure usually are not allowed to pursue a deficiency judgment.[118]

Although most states allow foreclosure by power of sale that permits sale of the encumbered property without judicial action, the procedure varies widely from state-to-state.[119] Power of sale foreclosure eliminates many of the judicial and procedural burdens of judicial foreclosure. Nevertheless, a mortgagee must comply strictly with statutory procedural requirements. States recognizing power of sale typically require notice of the sale to the debtor and protected parties, and a waiting period between the date of the notice and sale.[120] Whether power of sale foreclosure actions satisfy the due process requirements of the fifth and fourteenth amendments is not settled entirely.[121]

States permitting power of sale foreclosures also statutorily regulate the procedure for conducting the actual foreclosure sale. Noncompliance with these procedural requirements will furnish grounds for setting aside a power of sale foreclosure.

Almost every state provides for judicial foreclosure.[122] Under this method, the mortgagee brings court action for a court-ordered sale of the mortgaged property after sale. It is the primary method of foreclosure in at least half of the states.[123] The typical action is quite lengthy and includes a number of protections for the mortgagor, including the right to notice, an opportunity to be heard, notice of sale, proceedings for determination of right to surplus, and entry of a deficiency decree.[124]

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[117] The redemption period is one year in Maine and New Hampshire, three years in Massachusetts, and six months in Vermont. Mortgagees may elect judicial foreclosure because of these lengthy redemption periods. *See* Nelson & Whitman, *supra* note 110, § 8.4.

[118] Illinois refuses to permit deficiency suits after strict foreclosure and the statutes in Maine, Massachusetts, and Vermont do not provide specifically for deficiency judgments following strict foreclosures while providing for the remedy in foreclosures by sale. *Id.* § 7.10.

[119] About 25 states recognize power of sale foreclosure. Additionally, The Uniform Land Transactions Act authorizes power of sale foreclosures. *Id.* § 7.19.

[120] *Id.* § 7.19.

[121] Several law review articles have analyzed the power of sale statutes in light of the federal constitution. Logan, *Fbwer of Sale Foreclosure: What Process is Due?*, 36 Ala. L. Rev. 1083 (1985); Comment, *Fbwer of Sale Foreclosure After Fuentes*, 40 U. Chi. L. Rev. 206 (1972).

[122] Nelson & Whitman, *supra* note 110, § 7.11, at 505.

[123] *Id.*

[124] *Id.* § 7.12, at 506.

Veterans involved in property being judicially foreclosed may be able to maintain that they were not given adequate notice, or, in the case of assumed loans, were not joined as a necessary party. The interest of any party who has a right to redeem will not be terminated by a foreclosure action if they were not given notice or if they were omitted from the action.[125]

Veterans also may be able to maintain that the method of conducting a foreclosure sale was improper.[126] Although state and local laws differ greatly on the procedures to be followed, most jurisdictions have elaborate statutory protections designed to encourage fair sale prices and avoid transfers that are well below the value of the property.[127]

Oftentimes, the foreclosure action will not generate enough money to satisfy the total indebtedness. A mortgagee generally is entitled to recover the balance of the loan by obtaining a deficiency judgment. Typically this is obtained by a deficiency decree by the court supervising the foreclosure action.[128] If an assigned mortgage is sold for more money than the total indebtedness, the VA—not the veteran—is entitled to the excess.[129]

Veterans facing a deficiency after foreclosure may be able to take advantage of "antideficiency" legislation passed by many states that impose limits on mortgagees. Three states recognizing power of sale foreclosure specifically prohibit deficiency judgments following a power of sale.[130] Moreover, eight states limit recovery in the deficiency action to no more than the difference between the mortgage debt and the value of the mortgaged property.[131]

Although most states with judicial foreclosure statutes allow deficiency judgments, many states limit recovery in some way.[132] For ex-

[125] *Id.* § 7.15, at 518.

[126] For a commentary on the problems of foreclosure sales, *see* Berger, *Solving the Problem of Abusive Mortgage Foreclosure Sales.* 66 Neb. L. Rev. 373 (1987).

[127] Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosure, 36* S.C.L. Rev. 461, 480-81 (1985).

[128] Nelson & Whitman. *supra* note 110, § 8.1.

[129] Fitzgerald v. Cleland, 498 F. Supp. 341 (D. Me. 1980), *aff'd in part, rev'd in part*, *650* F.2d 360 (1st Cir. 1981).

[130] Cal. Civ. Proc. Code § 580(d) (West 1976); Or. Rev. Stat. § 86.770 (1981); Wash. Rev. Code Ann. § 61.24.100 (1974).

[131] Arizona, Idaho, Michigan, Nebraska, Nevada, North Carolina, and Utah limit the deficiency judgment to no more than the difference between the mortgage debt and the value of the mortgaged property. Nelson & Whitman, *supra* note 110, § 8.3, at 600.

[132] For example, some states limit deficiencies to certain types of mortgages or property, and others limit the amount of the judgment to no more than the appraised value and the mortgage debt. Nelson & Whitman, *supra* note 110, § 8.3.

ample, some states prohibit deficiency judgments if the property being foreclosed upon was secured with a purchase money mortgage.[133] Because the benefits of antideficiency legislation are defeated if the mortgagor waives the protections of the law, courts and states have taken steps to prevent waivers.[134]

Most states require a number of strict procedural requirements for obtaining deficiency judgments. Failure to comply with these requirements can provide grounds for invalidating the judgment.

Many states allow mortgagors the right of statutory redemption followingjudicial or power of sale foreclosure.[135] This procedure gives the mortgagor a grace period to redeem the mortgaged property after a foreclosure sale. The redemption periods vary greatly, from ten days in North Carolina[136] to three years in Rhode Island.[137]

B. RIGHTS UNDER FEDERAL LAW

Although foreclosure and deficiency actions will be brought within the framework of state law, federal law may provide certain remedies to veterans. These remedies or defenses might stem from constitutional guarantees of due process or specific federal statutes, such as the Soldiers' and Sailors' Civil Relief Act (SSCRA) and the Bankruptcy Code.

1. Constitutional ***Due Process***

A mortgagor may set aside a foreclosure action if the action did not satisfy minimal standards of due process required under the fifth or fourteenth amendment.[138] Because these amendments regulate governmental—not private—activity, a prerequisite to making this constitutional attack is to establish the existence of state action. The Supreme Court never has defined the state action requirement adequately, and lower federal courts have not reached a consensus on the issue.

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[133] *See* Cal. Civ. Proc. Code § 580(b) (West 1976); Ariz. Rev. Stat. Ann. § 33-729(A) (1956); N.C. Gen. Stat. § 45-21.38 (1969); Mont. Code Ann. § 93-6008; Or. Rev. Stat. § 88.070 (1981); S.D. Comp. Codified Laws Ann. § 44-8-20 (1970).

[134] Nelson & Whitman, ***supra*** note 110, § 8.3.

[135] Twenty-nine states recognize such a right. *See generally* Nelson & Whitman, *supra* note 110, § 102, at 594.

[136] N.C. Gen. Stat. § 1-339.37 (1969).

[137] R.I. Gen. Laws § 34-23-3 (1970).

[138] U.S. Const. amends. V, **XIV; *see,*** *e.g.*, United States v. Murdock, 627 F. Supp. 272 (N.D. Ind. 1985).

The early view adopted by most courts was that constitutional due process rights are not implicated if a foreclosure action was brought by the lender even though a governmental agency has been involved extensively. In Fitzgerald v. *Cleland*[139] a federal court held that the fifth amendment is not implicated when a bank assigned its interest in mortgaged property to the VA after initiating foreclosure action. In the court'sview, extensive governmental regulation is not enough to trigger constitutional due process rights; rather, a close nexus must exist between the VA and the lender so that the lender's actions can be considered those of the VA.[140]

Recently, courts have shown a willingness to find the requisite federal action in cases involving the VA. In United *States v. Whitney*[141] the court intimated that VA's use of judicial foreclosure in state court was sufficient to trigger the protections of the due process clause. Moreover, the court ruled that the acts and omissions of the VA that led to the denial of the veteran's rights of due process of law and adequate notice clearly constituted "state action" sufficient to implicate the fifth amendment due process clause.[142]

In United States v. *Murdock*[143] another federal court held that a veteran was entitled to proper notice of a foreclosure action seeking to extinguish the veteran's property right in the equity of redemption. Although the court did not address the state action issue, the court implied that the VA's involvement in the foreclosure action was sufficient to implicate procedural due process protections. In light of *Whitney* and Murdock it is fairly safe to conclude that the requisite "state action" is present when the VA is bringing the foreclosure action.

Once sufficient state action is established, a mortgagor must be able to demonstrate that his or her due process rights were infringed. The power of sale procedures allowed in many states rarely will survive due process scrutiny because notice by publication is permitted and a presale hearing normally is not required. Relying upon

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[139] 498 F. Supp. 341 (D. Me. 1980), *aff'd in part, rev'd in part*, 650 F.2d 360 (1st Cir. 1981).

[140] The court observed that other courts have concluded that foreclosure by a private lender in a federal guaranty program does not involve state action merely because extensive federal regulation is entailed. Warren v. Government Nat'l Mortgage Ass'n, 611 F.2d 1229 (8th Cir. 1980), *cert. denied*, 449 U.S. 847 (1980); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977).

[141] 602 F. Supp. 722 (W.D.N.Y. 1985).

[142] *Id.* at 733 n.11.

[143] 627 F. Supp. 272 (N.D. Ind. 1985).

several recent United States Supreme Court cases,[144] mortgagors successfully have attacked power of sale statutes as infringing constitutional due process guarantees of the fifth and fourteenth amendment.[145] The court in *Whitney* specifically held that notice by publication will be constitutionally deficient if the veteran's name and address is "reasonably ascertainable."[146] To protect rights in their property fully, veterans always should notify the VA of any changes in address.

Veterans also may attack power of sale foreclosures on the constitutional grounds that the due process clause of the fourteenth amendment requires a hearing before deprivation of property.[147] A three judge federal court has held that a hearing prior to foreclosure and sale is constitutionally required.[148]

2. *The Soldiers' and Sailors' Civil Relief Act*

If the property being foreclosed is owned by a service member on active duty, the member may qualify for relief under the provisions of the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940.[149] This equitable statute offers remedies if the requirements of military ser-

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[144] In Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983), the United States Supreme Court held that failure to give a mortgage holder actual notice of a pending tax sale violated procedural due process. ***Mennonite*** expanded a previous Supreme Court procedural due process decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which held that the notice given must be calculated reasonably to apprise interested parties of the action. Although *Mullane* involved judicial settlement of accounts by a trustee of a common trust fund, several courts have extended the holding to rule that publication notice of a power of sale foreclosure is not constitutionally acceptable. ***See, e.g.***, Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976); Roberts v. Cameron-Brown Co., 410 F. Supp. 988 (S.D. Ga. 1975). The adequacy of notice of power of sale foreclosures under the due process clause is addressed in Rubin & Carter, ***Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications,*** 48 La. L. Rev. 535 (1988), and Scott, ***Mennonite: What Does it Mean To Alabama Mortgagees After Federal Deposit Insurance*** *Corp. V. Morrison?,* 36 Ala. L. Rev. 969 (1985).

[145] Nelson & Whitman, *supra* note 110, §§ 7.24-7.26, at 563-71.

[146] 602 F. Supp. 722 (W.D.N.Y. 1985).

[147] Mortgagors making this argument rely on Sniadich v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment without a judicial hearing violates due process clause of the fourteenth amendment), and Fuentes v. Shevin, 407 U.S. 67 (1972), *reh'g denied*, 409 U.S. 902 (state replevin statutes struck down because no opportunity to be heard prior to repossession from possessor). The most significant hurdle for a mortgagor to succeed on this argument is to establish sufficient state action to apply the fourteenth amendment. If federal action can be found, foreclosure proceedings under state statutes could be found to violate the notice and hearing requirements of the fourteenth amendment.

[148] Turner v. Blackburn, 489 F. Supp. 1250 (W.D.N.C. 1975); ***see also*** Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976).

[149] 50 U.S.C. §§ 501-591 (1988) (originally enacted as Act of Oct. 17, 1940, 54 Stat. 1178).

vice compromises a member's ability to meet financial obligations or protect legal rights. While none of the statutory provisions remove legal obligations, service members may use the Act to suspend or modify legal obligations.[150]

Most of the provisions of the Act will apply if the mortgage was entered into prior to entry on active duty. Thus, the impact of the SSCRA will be limited in the area of VA loans because these loans generally are entered into during or after the commencement of active duty.

Several provisions of the Act may provide relief before mortgage default. Section 206 of the Act limits interest rates on obligations to six percent annually during the period of military service unless the ability of the member to pay is not materially affected by service.[151] Reservists called to serve on active duty after incurring high interest rates can trigger this interest forgiveness provision merely by writing to the lender and requesting that the interest rate be lowered to six percent. The lender has the burden of establishing that the member's ability to repay at the established higher interest rate is not materially affected by entry on active duty.[152]

Another section of the SSCRA provides that a member may apply to a court within six months of entry on active duty for relief in suspending or modifying preservice liabilities.[153] Thus, if active duty service will materially affect a service member's ability to repay a mortgage, the court may fashion a remedy in addition to reducing

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[150] The impact of the Act on mortgage foreclosures is developed in Switzer, *Mortgage Defaults and the Soldiers' and Sailors' Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 Real Est. L. J. 171 (1989). Several other articles discuss other aspects of the Soldiers' and Sailors' Civil Relief Act. *See* Hayn, *Soldiers' and Sailors' Civil Relief Act Update*, The Army Lawyer, Feb. 1989, at 40, Reinold, *Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation —Where's the Relief?*, The Army Lawyer, June 1986, at 17; Bagley, *The Soldiers' and Sailors' Civil Relief Act—A Survey*, 45 Mil. L. Rev. 1 (1969); Folk, *Tolling of Statutes of Limitations Under Section 205 of the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 157 (1983). *See generally*, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, JA 260, Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act (Jan. 1991) [hereinafter JA 260].

[151] 50 U.S.C. § 526 (1988).

[152] The phrase "material effect" is an essential element of several provisions of the SSCRA. In the context of the interest rate cap, a lender could demonstrate that a service member's ability to repay a loan at the prevailing interest rate was not materially affected by entry into active duty if the member's pay was higher in the military than received while a civilian.

[153] 50 U.S.C. § 700 (1988).

mortgage rates.[154] Relief under this provision may be granted only upon request of the service member and is available even if no foreclosure action is brought.

Section 205 of the SSCRA automatically tolls all statutes of limitations that otherwise would run against service members while they are on active duty.[155] This section has been construed to extend the time for redemption under state statutory redemption legislation to the period of active duty service.[156] Unlike other provisions of the SSCRA, section 205 does not require the service member to show that military service materially has affected their ability to participate in legal proceedings.

A number of SSCRA provisions also provide relief to mortgagors after foreclosure actions have commenced. One important right afforded mortgagors is provided by the stay provisions of sections 531 and 532, which give courts power to grant stays to soldiers who have defaulted on installment land contracts, mortgages, or deeds of trust.[157] Section 531 addresses stays on land installment contracts and requires judicial action prior to exercising contractual rights to termination, rescission, or repossession. Section 532 of the Act requires a creditor to obtain a court order before foreclosing on a mortgage.[158] Unless the member's ability to comply with the obligation is not "materially affected" by military service, the court must either grant a stay of the proceedings or make some other equitable disposition.[159] Courts have differed on the question of who has the burden of establishing material effect.[160]

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[154] *See, e.g.*, New York Life Ins. v. Litke, 181 Misc. 32, 45 N.Y.S.2d 576 (N.Y. Sup. Ct. 1943)(court stayed mortgage foreclosure when balloon payment became due and amortized amount in arrears over 10 years).

[155] 50 U.S.C. App. § 525 (1988).

[156] Illinois Nat'l Bank v. Gwin, 390 Ill. 345, 61 N.E.2d 249 (1945); Peace v. Bullock, 252 Ala. 155, 40 So. 2d 82 (1949). Some courts have held, however, that section 525 does not apply to career service members. Pannell v. Can Co., 554 F.2d 216 (5th Cir. 1977); King v. Zagorski, 207 So. 2d 61 (Fla. App. 1968). *See generally* JA 260, chap. 4.

[157] 50 U.S.C. §§ 531, 532 (1988).

[158] 50 U.S.C. § 532(3) (1988). This section provides that "No. . .foreclosure. . .of property. . .shall be valid if made . . .during the period of military service or within three months thereafter. . .unless upon order. . .by the court." Foreclosure without court action is a misdemeanor punishable by imprisonment for up to one year and a fine of up to $1000. This provision has been criticized as defeating the purpose of power of sale mortgage foreclosures. *See* Goldman, ***Collection of Debts Incurred by Military Personnel: The Creditor's View,*** 10 Tulsa L.J. 537 (1970).

[159] 50 U.S.C. § 302(2) (1988). Courts may grant a stay under this provision upon its own motion. They possess considerable discretion in applying this provision.

[160] *Compare* Meyers v. Schmidt, 181 Misc. 589, 46 N.Y.S.2d 420 (N.Y. Sup. Ct. 1944) (creditor has the burden to establish that the member's ability to defend is not materially affected by reason of military service) ***with*** Queens County Sav. Bank v. Thaler, 181 Misc. 229, 44 N.Y.S.2d 4 (N.Y. Sup. Ct. 1943) (court did not grant relief because the member failed to show that ability to pay was materially affected by military service).

Another stay provision, section 521, allows a court to grant a stay at any stage of a judicial proceeding if the service member's ability to participate as either a plaintiff or defendant is materially affected by military service.[161] A stay of execution may be granted under section 526 of the SSCRA if military service materially has affected the member's ability to comply with the judgment.[162] Finally, section 520 of the SSCRA provides protections to service members against default judgments and includes procedures for setting aside default judgment.[163]

3. Bankruptcy

The final source of federal law that might afford some refuge for the financially distressed mortgagor is the federal bankruptcy code.[164] This should be considered a last resort because of its potentially irreversible impact on a debtor's credit standing.

Under federal law, an individual may file for so-called "straight bankruptcy" to clear all debts, including mortgaged property.[165] Filing a bankruptcy petition will operate as a stay on any foreclosure action, even if the foreclosure action was initiated prior to the start of the bankruptcy. Of course, mortgagees and other secured creditors are not barred from enforcing a valid security interest during the bankruptcy. A discharge in bankruptcy, however, has the favorable aspect of barring deficiency claims that might arise when sale of the property is not sufficient to cover the mortgage debt. The debt will be dischargeable as to the VA only if the VA is a named creditor with actual notice of the bankruptcy.

A veteran also may seek to protect property from mortgagees by filing for a wage-earner's reorganization plan under chapter 13 of the Bankruptcy Code.[166] Chapter 13 permits debtors to cure defaults and keep possession of the encumbered property. Although a wage-

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[161] 50 U.S.C. § 525 (1988).

[162] *Id.* § 526.

[163] *Id.* § 560. This section requires plaintiffs to file an affidavit indicating whether the defendant is in the military service. If the defendant is on active duty, the court must appoint an attorney to represent the defendant's interest. A service member also may use this section to set aside a default judgment by showing that his or her ability to defend was materially affected by military service and that a meritorious defense existed. The effectiveness of this section is limited by the fact that it will not impair the title acquired by a bona fide purchaser.

[164] 11 U.S.C. § 1 (1988).

[165] *Id.* § 32(f).

[166] *Id.* §§ 1301-30. To be eligible for a chapter 13 wage-earner plan the debtor must have less than a total of $100,000 unsecured debt and $350,000 total secured debt.

earner plan generally may not modify the rights of holders of mortgages secured by the debtor's principal residence,[167] plans often provide a reasonable time for the debtor to cure a default on a home mortgage. The right to cure a default on a principal residence will be lost, however, if the chapter 13 request is filed before a foreclosure sale.[168]

V. CONCLUSION

Thanks to the VA home loan guaranty program, thousands of veterans have been able to share in the American dream of home ownership. Since the program began in 1944, Congress has been fairly responsive to changing economic conditions and to the needs of veterans. The recent changes in loan assumption procedures will go a long way toward eliminating one of the most troubling aspects of the program—the veteran's continued liability after a third party has defaulted on a VA-backed loan. Moreover, the creation of the Guaranty and Indemnity Fund in the 1989 Act provides much needed insurance to the agency and the veteran in the event of default.

Unfortunately, too many veterans have failed to take advantage of available administrative procedures—such as seeking release of liability or entering into a compromise agreement—to limit their liability when things begin to sour on guaranteed loans. The new requirement for the VA to provide counseling for veterans facing default should help ensure veterans understand their options and select those that will minimize or completely avoid financial hardship.

The new counseling program will succeed, however, only if veterans cooperate with the VA and seek help at the onset of financial difficulty. Congress should monitor the agency's capability to provide counseling and, if necessary, increase VA appropriations to provide adequate staffing and resources.

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[167] *Id.* § 1322(b)(2). Several excellent articles have addressed the impact of chapter 13 on home mortgages. *See* Zaretsky, *Some Limits on Mortgagee's Right in Chapter 13,* 50 Brooklyn L. Rev. 433 (1984); Comment, *Home Foreclosure Under Chapter 13 of the Bankruptcy Reform Act,* 30 UCLA L. Rev. 637 (1983)

[168] *In re* Glenn, 760 F.2d 1428 (6th Cir.), *cert. denied,* 106 S. Ct. 144 (1985). The *Glenn* case is discussed in Note, *Bankruptcy Law—Curing A Mortgage Default—A Chapter 13 Debtor May Cure Default on Mortgage of His Principal Residence if No Foreclosure Sale Has Taken Place,* 63 U. Det. L. Rev. 537 (1986). If there has been no sale when the chapter 13 petition is filed, the mortgagor is entitled to cure under the bankruptcy plan.

The VA home loan guaranty program never was intended to be a government grant program. Thus, the agency only can go so far in helping veterans facing loan default before its own interests are compromised. Congress has given the VA broad discretion to administer the program. Although one certainly can find individual cases in which the VA decision is open to question, the overall goals of the home loan program will be furthered if agency decisions are not open to unfettered second-guessing by the courts.

A veteran-mortgagor should not lose important rights under state law merely because a federal agency is bringing the foreclosure action. The recent trend in the courts, requiring the VA to comply with state laws designed to protect the interests of mortgagors, is reasonable and appropriate. While it undoubtedly entails additional costs, compliance with state law—particularly those laws requiring adequate notice—should not pose an unreasonable burden to the VA and will not jeopardize the overall goals of the loan-guaranty program.

Moreover, when pursuing foreclosure on an assigned loan, the VA should be required to use procedures that satisfy constitutional due process requirements. The VA has the capability in most cases to track down veterans and provide constitutionally sufficient notice. Providing notice and an opportunity to be heard is a small price to pay compared to the substantial interest veterans have at stake in these actions.

The VA loan program helps thousands of veterans and soldiers who otherwise might not qualify for conventional loans in the home market. The program achieves this goal by fairly balancing the interests of the government and the veteran. Even those veterans who are unable to fulfill their obligations under a VA-guaranteed loan have alternatives under the present framework of the loan program to limit financial liability. On balance, the VA loan guaranty program fairly can be characterized as friend, not foe, of the American veteran.

WHEN DOES THE SELLER OWE THE BROKER A COMMISSION? A DISCUSSION OF THE LAW AND WHAT IT TEACHES ABOUT LISTING AGREEMENTS

by Steven K. Mulliken*

I. INTRODUCTION

Attorneys often are troubled when real estate agents complete sales agreements for both parties to a transaction. This offends attorneys because it appears to be a conflict of interest, it provides the potential for overreaching and abuse, and it may constitute the unauthorized practice of law. Despite those concerns, the practice is quite common.

The seller's listing agreement with a real estate agent is another area with great potential for abuse. Though this situation does not pose similar questions of the unauthorized practice of law (the real estate agent is a party to the agreement), it does present problems of overreaching and potential difficulties for the seller. A significant number of cases have litigated listing contracts! The greatest number of those cases involve litigation concerning whether the seller owes the broker a commission.[2] Unfortunately, the average home buyer does not consult an attorney before employing a broker to sell a house. Rather, most consult attorneys after problems with real estate agents arise. Many of these problems could be minimized or avoided through proper drafting of the listing agreement.

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[1] A computer search for cases in United States courts that have litigated listing agreements revealed about 200 cases in a ten-year period from 1974 to 1983. While this number is not excessive in itself, the litigated cases likely represent a small percent of the issues that arose, as many more undoubtedly were settled before trial.

[2] 10 P. Rohan, B. Goldstein & C. Bobis, Real Estate Brokerage Law & Practice § 4.01 (1985) [hereinafter Rohan].

This article surveys the law concerning when a real estate broker earns a commission and focuses on when a seller may be liable for a commission even though the property did not sell. It discusses the traditional rule that a broker earns a commission when he or she brings to the seller a purchaser ready, willing, and able to meet the terms in the listing agreement.[3] The article also examines the minority rule that a commission is owed only if a sale occurs and title passes, unless the failure of the sale to go through is the fault of the seller.[4] Recent cases examining the issue are analyzed to determine whether any trends can be identified. Lastly, the article provides guidance for practitioners concerning drafting or reviewing listing agreements.

II. WHEN DOES THE REAL ESTATE AGENT EARN A COMMISSION—THE TWO DOMINANT THEORIES

A seller negotiating with a prospective real estate agent must determine when the real estate agent earns a commission. Will the commission be due when a contract for sale is signed, or only after closing? What happens if the buyer defaults or cannot get financing? Probably few sellers consider these questions before signing a listing agreement. Unfortunately, they frequently become critical concerns.

A. THE MAJORITY RULE: FINDING A READY, WILLING, AND ABLE BUYER

Most jurisdictions follow the rule that the broker earns a commission when he or she brings to the buyer a purchaser who is ready, willing, and able to buy the property on the terms set out in the listing agreement.[5] While the parties clearly are free to modify that common law rule in their agreement,[6] if they fail to do so, a commission may be earned even though a sale never takes place.[7] Similarly, a

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[3] *Id.* § 4.02(1).

[4] *Id.* § 4.03; ***see*** *also* Annotation, *Modern View* as *to* ***Right*** *of Real Estate Broker* ***to*** *Recover Commission From Seller-Principal Where Buyer Defaults Under Valid Contract of Sale,* 12 A.L.R. 4th 1083, 1094 (1983).

[5] Rohan, *supra* note 2, § 4.02(1). The author lists *25* jurisdictions that have adopted the traditional rule concerning when the commission is earned. ***See*** *also* Annotation, *supra* note 4, at 1090-93.

[6] Rohan, *supra* note 2, § 4.02(2). Because the seller generally is not represented during negotiations with the real estate agent, and because agents use form listing agreements prepared by their counsel, it is unlikely that the common law will be altered in favor of the seller.

This situation frequently occurs when the buyer defaults prior to closing. In that event, many jurisdictions would hold that the broker earned his commission when a valid sales contract was entered into. *See* Annotation, *supra* note 4, at 1090.

full commission generally will have been earned even if the purchaser defaults on payments shortly after closing.[8]

Many of the cases that hold that a commission is earned merely by producing a ready, willing, and able buyer involve situations in which the seller has backed out of the deal. For example, in *Hollinger v. McMichael*,[9] the seller signed a listing agreement with a broker that included a provision for a six-percent commission. The broker brought the seller a written offer, which was accepted and later modified to adjust the price to reflect the cost of points charged the seller because of FHA financing. When the broker called the seller to arrange closing, the seller indicated that the deal was off. The court found that the broker had earned his commission when he "procured a purchaser able, ready and willing to purchase the seller's property on the terms and conditions specified in the contract of employment."[10]

The general rule appears logical in cases in which the seller is to blame for the deal's failure. That same rule, however, also can result in liability for a commission when the deal fails through no fault of the seller. For example if, after the sales contract is signed, the purchaser is unable to get financing, the seller generally is still liable for a commission, even though no sale results.[11] The theory is that the seller is capable of investigating the financial backing of the prospective purchaser and accepts the purchaser by entering into a binding agreement.[12] The reality of most residential purchases, including the short time period most offers remain open, makes this theory more fiction than fact. Regardless, the seller frequently will be responsible for paying the commission in these circumstances although the deal never closes.

Liability for a commission also may occur in other instances that are not necessarily the result of seller bad faith, such as when a joint owner of the property becomes unable or unwilling to complete the transaction,[13] or when the seller has a defect in title.[14]

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[8] *See, e.g.*, Taylor v. Weingart, 693 P.2d 1231 (Mont. 1984).

[9] 177 Mont. 144, 580 P.2d 927 (1978).

[10] *Id.*, 580 P.2d at 929.

[11] Rohan, supra note 2, § 4.02(3).

[12] *Id.*

[13] *See* Guillotte v. Pope Quint, Inc., 349 So. 2d 62 (La. Ct. App. 1977). In *Guillotte* a husband entered into a listing agreement to sell the house. The wife did not sign the agreement because she was in the hospital at the time with mental problems. The broker was informed of her hospitalization, but may not have known that it was because of mental problems. The wife later refused to sell the property and thus no sale occurred. The court held that the broker had found a willing buyer and was entitled to his commission. *Accord* Joiner v. Lockart, 350 So. 2d 199 (La. Ct. App.), *cert. denied*, 352 So. 2d 240 (La. 1977).

[14] Rohan, supra note 2, § 4.04(2).

B. MINORITY RULE: UPON TITLE CLOSING

In 1967, in the case of *Ellsworth Dobbs, Inc. v. Johnson*,[15] the Supreme Court of New Jersey took the lead and reversed the traditional rule. *Dobbs* involved the failure of closing because of the financial inability of the buyer. A contract for sale was signed that called for $2500 in payments prior to closing. Those payments were made, but the buyer was unable to arrange financing to complete the sale. After tying up the property for a year, the seller released the buyer from the contract. The real estate agent sued the seller and the buyer for his commission. The Supreme Court of New Jersey departed from the traditional rule and held as follows:

> When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. *If the contract is not consummated* because of lack of financial ability of the buyer to perform or because of any other default of his,. . .there is no right to commission against the seller.[16]

Other jurisdictions have found the New Jersey rule persuasive, with courts in a number of jurisdictions expressly adopting the *Dobbs* position.[17] Additionally, at least one jurisdiction imposes the rule by statute.[18]

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[15]50 N.J. 528, 236 A.2d 843 (1967).

[16]*Id.*, 236 A.2d at 855 (emphasis added).

[17]Rohan, *supra* note 2, § 4.03(2); ***see*** *also* Annotation, *supra* note 4, at 1088. The following jurisdictions have either adopted or expressly approved the *Dobbs* holding: Goetz v. Anderson, 274 N.W.2d 175 (N.D.1978), Potter v. Ridge Realty Corp., 28 Conn. Supp. 304, 259 A.2d 758 (1969); Rogers v. Hendrix, 92 Idaho 141, **438** P.2d 653 (1968); Mullenger v. Clause, 1789 N.W.2d 420 (Iowa 1970); Winkelman v. Allen, 214 Haw. 22, 519 P.2d 1377 (1974); Tristram's Landing, Inc. v. Wait, 367 Mass. 622, 327 N.E.2d 727 (1975); Cornett v. Nathan, 196 Neb. 277, 242 N.W.2d ***855*** (1976); Sester v. Commonwealth, Inc., 256 Or. 11, 470 P.2d 142 (1970); Staab v. Messier, 128 Vt. 2380, 264 A.2d 790 (1970). For an in depth discussion of the *Dobbs* case, see ***Note,*** Ellsworth Dobbs, Inc. v. Johnson: ***A*** *Reexamination* *of* ***the Broker-Buyrr-Seller*** *Relationship in New Jersey,* 23 Rutgers L. Rev. 83 (1968).

[18]While the New Jersey case was a trend setter in the judicial arena, at least one legislature had foreseen the problem and legislatively eliminated it before *Dobbs*. Since 1963, Colorado statutes have provided the following concerning when the broker can claim a commission:

> No real estate agent or broker is entitled to a commission for finding a purchaser who is ready, willing, and able to complete the purchase by the owner until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon.

Colo. Rev. Stat. § 12-61-201 (1973).

The New Jersey rule clearly is the superior rule. It more accurately reflects the understanding of the parties, and works equity. While a number of jurisdictions have not adopted the New Jersey rule expressly, courts often attempt to reach the result of the rule through other doctrines. Although a seller can be found liable for a commission when title does not close, courts are hostile to this result and generally avoid imposing liability on a seller when the sale falls through, unless the failure of the sale was the seller's fault. Thus, most courts examine whether the seller was guilty of bad faith.

C. LIABILITY FOR A COMMISSION IS GENERALLY LIMITED TO SITUATIONS IN WHICH THE DEAL CLOSES OR THE SELLER DEFAULTS

If a real estate transaction fails to close because of the fault of the seller, courts often will find that a commission is owing. When the seller is not at fault, courts will avoid imposing liability on the seller for a commission by employing any number of doctrinal approaches. The primary doctrines are discussed below.

1. Construction of the Listing Contract to Require a Sale

Perhaps not surprisingly, one way courts frequently impose the New Jersey rule is by construing the listing agreement to require that a sale or exchange occur before liability for a commission arises. In some instances this is clearly legitimate, such as when the listing agreement uses language that clearly calls for a sale. Listing agreements in New York, for example, frequently indicate that the commission is due "as, if, and when title passes."[19] That language makes the commission contingent upon title passing.

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[19] *See, e.g.*, Graff v. Billet, 64 N.Y.2d 899, 477 N.E.2d 212 (1984). The strict construction of this language may work an injustice on the realtor. In *Graff* the broker brought what was apparently an acceptable offer under the listing contract. The seller refused to accept the offer, let the listing period expire, and then accepted a higher offer. The court construed the listing agreement strictly against the broker. The listing agreement included the following language: "The aforesaid commission is due and payable to the above named licensed broker as, if and when title passes (rider omitted), except for willful default on the part of the seller, in which case the commission shall be payable upon demand." *Id.*, 477 N.E.2d at 214. The court determined that a seller could be in willful default only after a contract had been entered into. The result of this decision, as aptly expressed by the dissent, is to permit sellers to avoid payment for the broker's efforts by refusing to sign an offer and waiting until the listing period expires.

Other jurisdictions stretch quite far to reach the desired result. For example, in *Diehl and Associates, Inc.* v. *Houtchens*[20] the court explained that a difference exists between a listing agreement that "requires a broker to merely find a purchaser and a brokerage contract which requires a broker to sell, make, or effect a sale."[21] The listing agreement the court was examining began by indicating that the real estate agent was employed to "sell or exchange the property." The court focused on that language to determine that the listing agreement required a sale before a commission was due. The court did not note the following language in the clause concerning the commission:

> In the event that you, or any other brokers cooperating with you, *shall find a buyer ready and willing to enter into a deal* for said price and terms, or such other terms and price as I may accept, or that during your employment you place me in contact with a buyer to or through whom at any time within 90 days after the termination of said employment I may sell or convey said property, I hereby agree to pay you in cash for your services a commission equal in amount to ____% of the above stated selling price.[22]

This language easily could be read to reflect the majority rule and require a commission if, during the listing period, the real estate agent finds a ready and willing buyer. The court, however, ignored the language and indicated that the plain and clear language of the agreement required a sale. The court actually ignored the fair meaning of the language, and imposed the New Jersey rule upon the parties. The sale fell through because the contract for sale included some substantial conditions that were not met. This failure was not the seller's fault.[23] Accordingly, the court legitimately could have treated the issue as a breach of contract for failure to produce a willing buyer, rather than stretch a fair reading of the language to find that the listing agreement required a sale.

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[20] 173 Mont. 372, 567 P.2d 930 (1977).

[21] *Id.*, 567 P.2d at 935.

[22] *Id.* (emphasis added).

[23] The conditions involved the granting of an easement and the failure to settle a boundary dispute. *Id.* at 933. Inclusion of conditions in the sales contract can protect the seller from owing a commission if the seller later backs out of the sale. For example, in ERA Real Estate Home Ranch Properties v. Big Horn Game Ranch, Inc., 692 P.2d 1218 (Mont. 1984), the corporate seller included a clause in the contract for sale that required the sale to be approved by all of the shareholders. No approval was obtained, and the court held that the real estate agent was not entitled to a commission because a sale had not occurred and no evidence of wrongful conduct existed on the part of the seller.

In *Property* **Brokers,** *Inc. v. Loyning*[24] a similar listing agreement was construed with the same result. That agreement also included a prefatory statement indicating that the broker was employed to sell or exchange the property. That language was followed by a provision indicating that in the event the broker found "a buyer ready and willing to enter into a deal" the seller would pay a commission.[25] The broker found a prospective buyer within the period of the listing agreement. The contract for purchase that the parties signed contained a provision making it contingent on sale of the purchaser's home. The buyer was unable to sell his home within the primary listing period (and the six-month extension period after its expiration during which the seller would be liable for commission if the sale was to a buyer placed in contact with the seller by the broker). After expiration of these periods, however, the buyer sold his home and bought the seller's home. The court found that the listing agreement required a sale, and that no sale occurred during the effective period under the listing agreement. This case is another example of a sale that failed because of no fault of the seller.[26]

2. *No Willing Buyer on Terms of the Listing Agreement*

a. In General—Offer Must Meet all Terms

A second and more common way courts permit sellers to avoid liability for a commission under contracts that require payment of a commission when brokers find ready, willing, and able buyers is to determine that no buyer was willing to buy on the listing agreement terms. In other words, the courts require that the broker find a buyer who is willing to meet all of the terms in the listing agreement before a commission is owed.

Renfro v. Meacham[27] is illustrative of how closely the terms of the offer must match the terms of the listing agreement before the seller may incur liability for a commission. In *Renfro* the listing agreement called for the sale of **550** acres of open land for $687,500 or equivalent price per acre, and sale of 1088 acres of woodland for **$562,500** or equivalent price per acre, or a total sale price of $1,250,000 for the entire property. Terms of the sale identified in the listing agreement called for one-half of the purchase price at closing and the balance in six months if the entire property was sold.

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[24] 201 **Mont. 309, 654** P.2d **521 (1982).**

[25] *Id.*

[26] **After seeing the lengths courts will go to find that a written agreement called for a sale before a commission is earned, it is not surprising that the court in *Big Horn* found that an oral listing agreement required a sale before a commission was earned.**

[27] 50 **N.C. App. 491, 274** S.E.2d **377 (1981).**

The broker brought an offer for $1,250,000 for **1638** acres or equivalent price per acre based on a survey to be run at the buyer's expense. The terms of the offer were to be half of the purchase price at closing and half six months later. The seller rejected the offer and allegedly refused to negotiate the terms. The broker sued for the commission, arguing that he had produced a ready, willing, and able buyer.

The court found for the seller, finding that the offer was not made on the terms of the listing agreement. The court focused on the difference caused by including the language "or equivalent price per acre" for a purchase of the entire tract, while that language was included in the listing agreement only after the price statement for each individual track.[28] Accordingly, the sale of the entire tract could result in less than the full $125,000 under terms of the offer if a survey discovered less than 1638 acres. This would not be possible under terms of the listing contract. Though this is true, the buyer could have accomplished the same result, consistent with the terms of the listing agreement, by offering the full asking price for each tract separately, rather than offering the full asking price for the entire parcel. The court also noted **a** similarly inconsequential difference in the financing terms that was caused by including the equivalent price per acre language after the full acreage, rather than after the two tracts. This case would suggest that a seller can provide maximum flexibility by making the terms of the listing agreement as specific as possible. The chance of a broker finding a buyer who will offer identical terms is remote. If the listing agreement is sufficiently detailed, the seller may be at greater liberty later to change his mind about the wisdom of a sale and reject the offer as long as the offer is not identical to the listing agreement on all substantial terms.[29]

The courts can make the broker's job next to impossible. In *Harding v. Warren*[30] the listing agreement set out the purchase price and specified the terms of payment. The listing agreement clearly required a twenty-nine percent down payment and the balance amor-

[28] *Id.*, 274 S.E.2d at 380. Interestingly, the offer contained additional terms that the court did not discuss. For example, the offer provided that each party would pay their own attorneys' fees, and that taxes would be prorated.

[29] For other cases in which the seller has avoided owing a commission when rejecting an offer that contained terms different than those in the listing agreement, see Wilson v. Upchurch, 425 N.E.2d 236 (Ind. App. 1981); William G. Vandever Co. v. Black, 645 P.2d 637 (Utah 1982); and Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977).

[30] 30 Wash. App. 848, 639 P.2d 750 (1982).

tized over twenty years, with a balloon payment after ten years. No interest rate was listed on the line containing the financing terms. Below this line was an indication of the current financing on the property that included, in two places, the term seven percent.

The broker brought an offer for the full asking price, including a twenty-nine percent down payment and a seven-percent interest rate on the balance. The seller rejected the offer and the broker sued for his commission. The issue was whether the offer matched the listing agreement. The court determined that the listing agreement was ambiguous as to the financing term and accepted parol evidence as to the terms. The seller alleged that the interest rate was to be negotiable, while the broker alleged that they had agreed on seven percent. The court believed the seller. Because the interest rate was considered negotiable, the broker was found not to have produced a ready, willing, and able buyer on terms acceptable to the seller. Additionally, the court determined that the seller had no obligation to negotiate unless the seller had refused to do so in bad faith.[31]

Harding indicates that the seller need only include one term that is left negotiable, and then refuse to negotiate that term, to avoid liability. Some limitation on the seller exists in that his refusal to negotiate cannot be in bad faith. Proving bad faith, however, puts the broker to a difficult test.

If the listing agreement does not include a negotiable term, the same objective can be accomplished using the sales contract. In *ERA Real Estate Home & Ranch Properties v. Big Horn Game Ranch, Inc.*,[32] for example, the parties had an oral listing agreement. When the broker brought the seller a contract for sale, the seller had inserted in the contract a provision requiring that the corporate shareholders informally approve any sale. Although the shareholders approved of the sale during a meeting, no formal ratification of the offer ever occurred. Because this condition was part of the sales contract and never was met the court determined that no commission was due.

If the seller intends to rely on a negotiable term or condition in the listing agreement, that term or condition should be carried over into any contract for sale. Failure to include the term in the contract

[31] The broker alleged that the seller refused to meet to discuss offers, never informed the broker of the objection to the seven percent interest rate, changed his mind about wanting to sell that year's crop with the property, and had decided he wanted a tax-free exchange rather than a contract for sale. Id., 639 P.2d at 754.

[32] 692 P.2d 1218 (Mont. 1984).

may, under the merger theory, mean that it no longer applies. In *Taylor v. Gaudry*[33] the listing agreement included a provision that made any sale contingent upon the seller approving the buyer's business qualifications. The broker brought an offer, which, after a counter offer by the seller, resulted in a signed agreement. The sale never was completed, but the broker sued the seller for the commission, arguing that he had produced a ready and able buyer. The seller apparently backed out of the deal believing the buyers did not have sufficient financial ability. The seller also defended by arguing that the broker had not produced a buyer agreeable to the seller because he had not approved the buyer's business qualifications. The court noted that this condition—approval of the business qualifications of a prospective buyer—had not been carried over from the listing agreement to the sales contract. Accordingly, because the sales contract constituted a new agreement and overcame the listing agreement, that condition was not relevant to the inquiry. According to the broker, the business qualifications of the buyer were discussed with the seller at the time of the initial offer, and the seller accepted the buyer's qualifications. Seemingly, then, brokers can benefit from their own inept (or perhaps skillful and cunning) drafting of the sales contract by failing to carry over a term from the listing agreement to the sales contract.

While a seller generally can be protected from having to pay a commission for a sale that does not occur by including sufficient provisions or conditions in the listing agreement, bad faith always is a limitation. If the court believes that the seller refused to accept an offer in bad faith or took advantage of the broker's efforts without paying, the court in most instances will find that the broker earned a commission.[34] Some cases, however, would indicate that the seller can go pretty far without reaching this point. One illustration is *Colorado City Development Co. v. Jones-Healy Realty, Inc.*[35]

The broker for Jones-Healy was working under an oral, nonexclusive listing agreement to sell the property for a cash price of $220 per acre. The broker brought an offer for the full asking price, but the offer included terms additional to those in the listing agreement (inclusion of equipment and livestock with the sale and conducting a survey). The seller's board initially approved the sale subject to approval of an ad-hoc committee made up of some of the directors. The committee failed to approve the sale, and the offer never was accepted. The evidence indicated that the committee's failure to ap-

[33]46 Or. **App.** *235,* 611 P.2d 336 (1980)
[34]Rohan, *supra* note 2, § 4.04(1).
[35]195 *Co.* 114, 576 P.2d 160 (1978).

prove the offer was due to its belief that the property was worth more than the $220 per acre, the price reflected in the listing agreement.

Jones-Healy sued for its commission, alleging bad faith rejection by the seller. The trial court noted that the offer from the sellers contained substantial differences from the listing agreement, which entitled the seller to reject the offer without indicating to the broker why the offer had been rejected.[36] The trial court entered judgment for the seller and the broker appealed.

On appeal, the court of appeals noted that the board of directors had decided to reject the offer not because of any of the substantial new terms, but because it felt the price was too low. The court refused to let the sellers rely on the additional terms when the reason for the rejection was their disagreement with the price reflected in the listing agreement and offered by the buyer. Finding that the sellers rejected the offer to hold out for more money, the court remanded the case for a directed verdict for the broker.[37]

The broker did not get the last laugh, however. The seller appealed to the Colorado Supreme Court.[38] The court reversed, and indicated that when the terms are substantially different, the seller can reject the offer for any reason, even if the seller merely had changed his mind about selling. Thus, at least in Colorado, if the offer contains any substantial terms different from those in the listing agreement, the seller can reject the offer, regardless of the real reason for the rejection.

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[36] Jones-Healy Realty, Inc. v. Colorado City Dev. Co., 568 P.2d 88 (Colo. Ct. App. 1977), *rev'd*, 576 P.2d 160 (Colo. 1978).

[37] The court of appeals stated:

> The owner may decline to convey or complete the sale. He may so decline for the reason that he may get more by holding and raising his price, or for any other reason; but this does not and should not relieve him from his liability to pay his broker for his services in procuring a person able, ready and willing to purchase at the terms given, the same as if he had completed the sale.

Id. at 90 (citing Dickey v. Waggoner, 114 P.2d 1097 (Colo. 1941)).

[38] Colorado City Dev. Co. v. Jones-Healy Realty, Inc., 576 P.2d 160 (1978). The Colorado Supreme Court made the following distinction concerning minor and substantial variations:

> An offer to purchase real estate often differs from the terms of the listing agreement in some respect or adds terms regarding matters not addressed in the listing. Where the variations are minor, the seller is obligated to identify those on which it would rely if it chooses to reject the offer. Fairness requires that the broker be afforded the opportunity to correct minor variations so that the sale may be completed and a commission earned. However, when the variations are substantial, the seller is entitled to refuse the offer without specifying the reason for its rejection. The broker is charged with knowledge that the substantial variation exists when he submits the offer.

Id. at 162.

b. Financially Able Buyer.

An issue that arises with some frequency is whether the seller owes the broker a commission when the transaction fails to close because the prospective buyer is financially unable to complete the purchase. In those states that have adopted the New Jersey position, of course, there would be no liability for a commission because title never passed.[39] In other jurisdictions, the question is whether the broker has performed under the listing agreement. The analysis in situations in which the seller rejected an offer from a purchaser whom the broker alleges was a ready and able buyer is different than the analysis in situations in which the seller accepted the offer and entered into a purchase contract with the buyer and then discovered the buyer's financial inability.[40]

(1) ***Rejecting the** Offer.* When the seller refuses to accept an offer and the broker brings suit to recover a commission, courts generally will require the broker, as part of his case, to prove that the purchaser had financial ability.[41] This makes sense because the listing agreement generally indicates that the broker earns the commission upon presenting a ready, willing, and able buyer. A buyer who is not financially capable of buying the property should not be construed to be an able purchaser.[42]

While courts will use this to protect a purchaser who properly rejects an offer from an unqualified buyer,[43] the protection is far from absolute. For example, in ***Fleming** Realty & Insurance, Inc. v. Evans*[44] the seller rejected an offer brought by the broker, claiming that the buyer was not financially able to purchase the property. The issue was sent to the jury, and the broker produced sufficient evidence to convince the jury that the buyer had the necessary means to fund the deal.

McGill Corp. v. Werner[45] is an example of a seller who unsuccessfully attempted to defend her rejection of an offer for full price based on the buyer's financial inability. In *McGill Corp.* when the seller rejected the offer, she made a counter offer at the same price, but

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[39]*E.g.*, Cornett v. Nathan, 196 Neb. 277, 242 N.W.2d 855 (1976).
[40]Rohan, *supra* note 2, § 5.02.
[41]*Id.* § 5.02(3).
[42]*E.g.*, Goetz v. Anderson, 274 N.W.2d 175 (N.D. 1978).
[43]*See, e.g.*, Rusciano Realty Servs., Ltd. v. Griffler, 62 N.Y.2d 696, 465 N.E.2d **33,** 476 N.Y.S.2d 526 (1947).
[44]199 Neb. 440, 259 N.W.2d 604 (1977).
[45]631 P.2d 1178 (Colo. Ct. App. 1981).

included additional terms. She asked to be permitted to store her personal property on the land, asked for more earnest money, and specified a real estate agent's commission of seven percent rather than the ten percent indicated in the listing agreement and first offer. Her counter offer was not accepted, and the buyers bought another home from the same real estate agent. The agent sued successfully for his ten-percent commission. The court rejected the seller's defense that the purchasers were not financially able. The buyers had received a tentative loan commitment at the time of the rejection, and the court indicated that this was evidence that the buyers "had the financial ability to complete the purchase within the time permitted by the offer."[46]

(2) *Default* by *Buyer* ***After*** *Contract Signed.* When the buyer defaults after signing a contract for sale, most jurisdictions will hold that the broker need not prove that the purchaser was financially able because the seller has accepted the purchaser by entering into a contract.[47] The broker, therefore, earns the commission even though the purchaser later defaults. Because of the harshness of this rule, a growing number of jurisdictions hold that the broker represents that the purchaser is financially able and that the seller can rely on the broker's expertise.[48] This position is a necessary result of the jurisdictions following the New Jersey rule formulated in *Dobbs.*[49]

The minority position arguably makes more sense in today's market. The seller employs a real estate agent to do more that just show the property. The seller expects the agent to screen prospec-

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[46]*Id.* at 1180. Some jurisdictions treat the seller who rejects a buyer on the basis of financial ability much more favorably. For example, in *Goetz* the court explained the broker's obligation as follows:

> In summary, the procuring of a prospective purchaser under an exclusive listing agreement implies the production of a ready, willing, and financially able purchaser. The financially able condition refers to the requirement at the time of closing the transaction of either having the funds to make the payment or be in a position to arrange for the necessary financing to pay for the property to be purchased, but does not refer to subsequent developments. It therefore follows that for a real estate broker to be entitled to a commission pursuant to an exclusive listing agreement he must produce a prospective ready, willing and financially able purchaser of the property. It also follows that if the seller rejects the purchaser, evidence must be introduced to establish that the seller's refusal to consummate the sale was arbitrary, capricious, unreasonable, or wrongful and was not for good cause.

Goetz, 274 N.W.2d at 182-83. As can be imagined, it would be difficult for a broker to prove that the seller wrongfully rejected the buyer under the standards in North Dakota. Again, what the court examines is whether the seller acted in bad faith.

[47]Rohan, *supra* note 2, § 5.02(1).

[48]*Id.* § 5.02(2).

[49]*See* text accompanying notes 15-16.

tive purchasers to ensure they are financially capable of buying the property. The broker wastes the seller's time by showing the property to those unable to purchase it. Further, today's lending practices are more complex than before, with many different types of financing being offered by a greater variety of institutions. Actually, because of this complexity, some mortgage brokers specialize in finding loans for buyers.[50]

D. IDENTIFYING AND AVOIDING THE RISKS

Though the majority rule may seem inequitable, the practitioner should be aware of the risks it poses to clients. The following cases illustrate those risks and suggest how they can be avoided.

In *Taylor v. Gaudry*[51] the seller of a business noted in the listing contract that any sale was conditioned upon approval of the business qualifications of the buyer. When an offer was received, the resulting sales contract did not include the condition. The court determined that the seller could not rely on the failure of that condition in defense to owing a commission to the real estate agent because the listing contract was overcome by the contract for sale. Thus, any condition that the seller wants to rely upon must be found in the listing agreement *and* the sales contract.

A similar problem is demonstrated by *Fleming Realty and Insurance v. Evans*.[52] The seller entered into a listing agreement with the broker. The listing agreement specified a price of $155,840, including $34,000 down, and $12,184 per year for ten years. Although it indicated that the seller would carry the financing (less down payment), the listing agreement did not provide that the sale was contingent on the seller approving the financial capability of the prospective buyer. The broker found a buyer who was willing to buy the property on the terms of the listing contract. The seller refused the offer, alleging that the buyer was not financially able to purchase. When the matter was submitted to the jury, the jury examined the financial assets of the prospective buyer, found him able, and awarded a commission to the broker. The court held that a "prospective purchaser is financially able if he has capability to make the down payment and all deferred payments required under the proposed contract of sale."[53] The lesson is that whenever a seller intends to pro-

[50] *See, e.g.*, William G. Vandever Co. v. Black, 645 P.2d 637 (Utah 1982).
[51] 46 Or. App. 235, 611 P.2d 336 (1980).
[52] 199 Neb. 440, 259 N.W.2d 604 (1977).
[53] *Id.*, 259 N.W.2d at 606.

vide financing as part of a sale, the seller would be wise to include in the listing agreement a provision making any sale contingent on the seller's personal satisfaction with the buyer's financial status. While such a provision probably would not protect the seller if the rejection is in bad faith, it would give the seller more freedom to reject a buyer based on the seller's personal evaluation of the buyer's creditworthiness. As mentioned above, if the seller signs a contract for sale, this provision should be carried over to the sales contract.

A related problem that should be anticipated and avoided concerns the possibility of default by the purchaser after closing. In *Taylor v. Weingart*[54] Weingart entered into a sales contract with a purchaser brought to him by Taylor, the broker. The sales contract called for a commission of five percent upon a sale. The financing terms provided for a down payment of $50,000, a **$160,000** payment at closing, **$210,000** by May **12, 1982,** and the balance of the **$1,750,000** purchase price to be paid in installments over a twenty-five-year period. Closing took place, but the buyer was unable to make the **$210,000** payment by May **12.** At the time of the default, the broker had not been paid his full commission, and he sued for the balance due. The seller tried to defend on a number of theories, none of which was successful, and the court entered judgment for the broker.

This case illustrates that once closing has occurred, all risks of future compliance are on the seller unless the contract provides otherwise. Under the law of most jurisdictions most courts will hold that the seller has accepted the buyer when the sales contract is signed.[55] The stated rationale for this rule is that the broker does not ensure performance under the contract.[56] Whether or not this seems equitable, the seller can alter this result either by placing conditions in the listing agreement or by altering the clause for payment of commission to the broker.[57] For instance, if the sales contract will include seller financing, the seller may want to consider paying a portion of the real estate agent's commission over time out of the anticipated receipts under the contract and conditioning those future commission payments on receipt of amounts due under the sales contract. This would provide some protection to the seller and would shift some of the risk of future performance to the broker.

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[54]693 P.2d 1231 (Mont. 1984).
[55]Rohan, *supra* note 2, § 5.02(1).
[56]*Id.* (citing Bushnell Real Estate, Inc. v. Nielson, 672 P.2d 746, 751 (Utah 1983)).
[57]*E.g.*, Ferrara v. Firsching, 533 P.2d 1351 (Nev. 1975).

E. LIABILITY FOR COMMISSION AFTER EXPIRATION OF THE LISTING CONTRACT

Perhaps the most dangerous area for sellers is the possibility of owing a commission to a broker based on a sale of the property after the listing contract has expired. This can come as somewhat of a surprise and can work a tremendous hardship. An attorney advising a seller about selling real estate should caution sellers about this danger. The problem most often arises in one of two contexts.

1. *Extension Clauses*

Listing agreements often extend liability for a commission for a stated period of time beyond expiration of the listing period should the seller sell the property to a buyer identified by the broker.[58] The wording of these provisions varies considerably. For example, some indicate that the sale must be due to the broker's efforts,[59] while others require that the buyer be'one with whom the broker had negotiations,[60] or one whose interest in the property was initiated by the broker or who was placed in contact with the seller by the broker.[61] The length of time for which this period of liability may run varies, but generally is not less than three months, and may be up to one year.

Some listing agreements include a stated initial period for the listing, but include a clause that keeps the agreement in force until the seller gives the broker written notice of termination of the agreement.[62] With this automatic renewal provision, the seller often mistakenly assumes that the agreement has expired.

Extension clauses serve the legitimate purpose of preventing a seller from unfairly benefiting from the labors of the broker by

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[58] *See, e.g.*, The Nebraskans, lnc. v. Homan, 206 Neb. 749, 294 N.W.2d 879 (1980): Heckenlaible v. Fromherz, 28 Or. 199, 577 P.2d 523 (1978).

[59] *See, e.g.*, *The Nebraskans, Inc.*, 294 N.W.2d at 879.

[60] The following language is used in a real estate listing contract from the Hutchinson Board of Realtors in Kansas:

> PROTECTION PEKIOD: The SELLER agrees to pay the aforesaid brokerage fee should a sale be made directly by the SELLER within _____ days after this exclusive right to sell terminates to parties with whom the REALTOR has negotiated with or whose interest in the property was initiated by REALTOR during the term hereof providing the REALTOR has notified the SELLER in writing of such negotiation during the term of the exclusive right to sell, unless the property is re-listed with another licensed person.

[61] *See, e.g.*, *Heckenlaible*, 577 P.2d at 523, *Ferrara*, 533 P.2d at 1351.

[62] *See, e.g.*, Jackson v. Free, 442 So. 2d 1346 (La. Ct. App. 1983).

waiting a few days beyond the expiration of the listing agreement to close a deal. For example, in *Collins v. Ogburn Realty Co.*[63] the seller gave an exclusive listing to the broker for 120 days. The contract called for a six-percent commission if the home was sold during the listing period, or if within ninety days following the expiration of the listing agreement it was contracted for by one to whom the broker had shown the property during the listing agreement. The broker brought a buyer to the seller while the listing agreement was in force, and the seller and buyer entered into a contact for purchase. The sales contract was made contingent on the buyer selling his house, but gave the buyer immediate possession of the property pursuant to a lease provision. The buyer did not sell his house quickly, and, as a result, the sale of the seller's home did not occur during the listing period. The seller sent a letter to the broker instructing him to refund the buyer's deposit because no sale had occurred during the listing period. The broker refused, arguing that he had earned his commission because the contract for sale of the property was entered into within the 120-day period, even though the eventual sale did not get finalized until after the listing period. The court found that the broker was the procuring cause of the sale and, therefore, had earned the commission.

While extension agreements can serve a legitimate purpose, they also can be abused, and frequently are met with hostility by courts. Courts generally will construe the agreement rigidly against the broker who drafts the agreement.[64] For example, in *McCartney v. Malm*,[65] the broker drafted a listing agreement that included an attempt at an extension clause. The clause included the following language: "or if the property is afterwards sold within six **(6)** months from the termination of this agency to a purchaser to whom it was submitted by listing REALTOR."[66] That language, however, was not integrated accurately into the remainder of the commission clause. Within the six-month period following expiration of the listing agreement the seller sold the property to a buyer identified by the broker during the period of the listing agreement. Despite its statement that such clauses were common practice in listing agreements, the court determined that the extension agreement was ambiguous and refused to enforce it. The court, however, found no bad faith on the part of the sellers and indicated that any ambiguity had to be resolved against the author of the instrument.

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[63] 49 N.C. App. 316, 271 S.E.2d 512 (1980).

[64] *See, e.g.*, McCartney v. Maim, 627 P.2d 1014 (Wyo. 1981). "Finally, any ambiguity in the contract must be resolved against appellants (realtors) as authors of the instrument." Id. at 1020.

[65] *Id.*

[66] *Id.* at 1018.

In *Jackson v. Free*[67] the listing agreement granted the broker an exclusive right to sell for **365** days from the date of the agreement and thereafter until the broker received a fifteen-day written notice terminating the agreement. Additionally, the agreement included an extension clause requiring a commission if, within one year from the termination of the agreement, the property was sold to any person with whom the broker had negotiations. The contract called for a ten-percent commission. The broker found a potential buyer and submitted an offer to purchase. The offer was countered, and the counteroffer never was accepted. The property later was sold to the first offeror under terms identical to the first offer. The sale, however, occurred a little over two years after the listing contract was signed. When the broker sued for a commission, the seller alleged that she had sent a letter terminating the agreement, and produced a copy of it. The broker denied ever receiving the letter. The court found that it had been sent and that the agreement and extension period had expired, resulting in a verdict for the seller.

For the extension clause to be effective, the broker will have to show that the eventual buyer was introduced to the seller during the period of the listing contract.[68] If the buyer is not identified until after the listing period has expired but during the extension period, the broker, in many jurisdictions, will not be successful in using the clause to recover a commission.[69]

2. *Procuring Cause* Doctrine

When two brokers claim entitlement to a commission from the proceeds of the same sale, the courts generally try to determine which broker was the procuring cause of the sale.[70] In some jurisdictions, however, this doctrine is used to permit a broker to recover a com-

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[67] 442 So. 2d **1346** (La. Ct. App. **1983).**

[68] In Heckenlaible v. Fromherz, **577** P.2d **523** (Or. 1978), the listing contract included the following language:

> "In the event that you shall find a buyer ready and willing to enter into a deal for said price and terms, or at such other price and terms as I may accept, or that I am placed in contact with a buyer to or through whom at any time within **90** days after the termination of said employment I may sell or convey said property, I hereby agree to pay you in cash for your services a commission equal in amount to seven% of the above stated selling price."

Id. at **523** (quoting Harkey v. Gahagan, **338** So. 2d **133** (La. Ct. App. **1976)).** The broker, shortly after the listing agreement expired, brought a buyer to the seller and a sale resulted. The court denied the broker a commission, stating that "[p]resenting a seller with a buyer for the first time after the listing agreement has expired is no different than presenting a seller with a buyer when no agreement exists." *Id.* at **524.**

[69] *Id.*

[70] Rohan, *supra* note 2, § **4.07.**

mission when the broker has placed the seller in contact with a buyer during the listing agreement, but the contract for sale and actual sale occur after the listing agreement has expired.

The procuring cause doctrine can provide a basis for recovery when no extension clause is present in the listing agreement, or it may provide a basis for recovery independent of the extension clause.[71] To obtain relief under the procuring cause theory, the broker must show that he did more than just aid the sale.[72] "Procuring cause refers to the efforts of a broker in introducing, producing, finding, or interesting a purchaser, and means that negotiations which eventually lead to a sale must be the result of some active effort of the broker."[73] Thus, the mere absence of an extension clause will not necessarily prevent the broker from obtaining a commission. Of course, in many jurisdictions, oral listing agreements are permitted, and courts can find that the parties who previously had a written listing agreement either extended it or entered into a subsequent oral listing agreement.[74]

III. DRAFTING CONSIDERATIONS

While the law concerning when a commission is earned frequently is favorable to the seller, significant risks still exists that can and

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[71] In Jackson v. Free, 442 So. 2d 1346 (La. Ct. App. 1983), the listing contract contained an extension clause. The court found that the doctrine of procuring cause could entitle the broker to relief when the extension clause was not effective:

> "The purpose of the extension clause in a real estate listing contract is to insure the realtor's right to a fee when the property owner sells the property subject to the listing after expiration of the primary term to a purchaser who had been located or otherwise interested in the property by the realtor's effort. The realtor does not have to be the procuring cause in order to activate the extension clause. He need not have been involved in active negotiation with the purchaser at the time of the expiration of the primary term."

Id. at 1348 (quoting Harkey v. Gahagan, 338 So. 2d 133 (La. Ct. App. 1976)). The court continues by indicating that "a real estate broker is entitled to a commission if he is the 'procuring cause' of the sale, even though the term of his listing agreement may have expired." *Id.*

[72] *Id.* at 1349.

[73] *Id.*

[74] For example, in Dickerson v. Hughes, 370 So. 2d 1301 (La. Ct. App. 1979), the seller initially had listed his property with the broker, but the property did not sell. At the expiration of the listing the seller validly terminated the agreement. A few months later, the seller stopped by the broker's office and told him that if he knew of someone interested in the house to bring them by. The broker brought an interested buyer to see the house, and the seller was present during that showing. The seller then proceeded to negotiate a sale directly with the buyer, and, actually sold the home to the buyer a month later. The broker sued for a commission and prevailed. The court found that the seller's few words when he stopped by the broker's office were sufficient to form an oral listing agreement.

should be avoided. A lawsuit may cost the seller more than the commission. For attorneys who are fortunate enough to have a client seek their advice prior to entering into a listing agreement, the following issues should be considered when reviewing or drafting a listing agreement.

The obvious starting point is to make certain that the time when the commission is earned is clearly set out. From the seller's perspective, the commission should be made contingent on title closing. This will remove any doubt and will contractually guarantee treatment consistent with the modern trend established in New Jersey.[75]

The parties should anticipate and provide for any contingencies that might cause the deal to fall through and should allocate the risks themselves. If, as suggested above, the commission is made contingent on title passing, the risk is on the broker if the buyer is unable to obtain financing or breaches the agreement before closing.

Another risk that should be anticipated is failure of title. If the transaction cannot be completed because a title defect exists, who should bear the loss? Thoughts may differ on this. Some may believe the seller should bear the risk, because he or she may be able to take action to cure title or may be insured for loss from title defects. Sometimes, however, curing title requires cooperation by the buyer, at least in extending the time to close. At any rate, the parties should anticipate this problem and specify how it should be handled. Listing contracts often address this risk and, not surprisingly, they generally place the burden on the seller.[76]

Two other situations that could occur and should be anticipated are foreclosure against the seller and subsequent default by the buyer after closing. First, if the broker is unable to find a buyer and the property stays on the market for an extended period, the seller could become financially strapped, resulting in a foreclosure sale. If the broker has an exclusive right to sell, should a foreclosure sale be considered a sale or exchange under the listing agreement? That adds insult to injury and should be avoided.

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[75] *See, e.g.*, Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

[76] The following language is taken from a sample listing agreement produced by the Hutchinson Board of Realtors in Kansas: "MARKETABLE TITLE: The REALTOR has informed SELLER of their responsibility to provide the BUYERS of the property with evidence of marketable title and also to provide access for inspections, if any, when called for in a sales agreement and our obligation to disclose any known material defects."

A more likely problem may result if the buyer defaults. If the default occurs before closing, and the listing agreement calls for a commission only upon closing of title, then no commission will be owing. When, however, the seller is financing part of the purchase, the seller may want to make some part of the commission payable over time from receipts from the installment payments; in this way, the broker shares the risk of future performance.[77]

The period of the listing should be identified clearly, preferably by indicating termination as of a specific day of the month rather than after a given period. If the agreement will include an extension clause by which the seller agrees to pay a commission to the broker during a period following expiration of the listing agreement should a sale occur to one identified by the broker, the agreement also should require that the broker, within a short period after expiration of the listing agreement, deliver to the seller a listing of all parties to whom the property has been shown. The seller cannot know who has seen the property with the broker, because the seller may not even be present when the property is shown. Requiring the broker to provide a list to the seller can avoid confusion and permit the seller to exclude those parties from coverage under a listing agreement with a subsequent broker.

As a practical matter, if a client seeks assistance after terminating a listing agreement that included an extension clause, but that did not require the first broker to provide a list, the seller should be advised to request one from the first broker and to refuse to sign a contract for sale until confirming with the first broker that the prospective purchaser was not identified by the first broker. If the purchaser was identified by the first broker, the seller should refuse to accept the offer until the two brokers concerned agree how to split the commission. Also, any extension clause should require payment of a commission only upon an actual sale, not upon signing of a contract for sale.

In most instances the attorney will be assisting the client by making the terms of the listing agreement as specific and detailed as possible. The seller generally will not be bound to accept the offer unless the offer matches the terms of the listing agreement.[78]

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[77] Putting some of the risk of future default by the buyer on the broker makes good business sense. The broker, if not subjected to the risk, has no interest in the buyer's ability to perform beyond closing. If some of the broker's commission is dependent on the buyer's future payment performance, the broker may be more motivated to screen the buyer adequately based on financial ability.

[78] *See supra* notes 28-50 and accompanying text.

To the extent the variations are not substantial, the seller may have a duty to negotiate the terms, but the seller still will gain flexibility by having a detailed listing agreement. If the sale will include seller financing, the acceptable financing terms should be specified, and the sale should be made contingent upon the seller personally approving the creditworthiness of the buyer.[79] When negotiating with a real estate agent concerning who should bear the risk of default by the buyer prior to closing, the seller should be aware that the broker can, in the sales contract, shift liability for a lost commission to the buyer in case of default by the buyer.[80]

A related point is that the seller should be advised to make the price reflected in the listing contract high and the payment terms optimal. As shown above, a seller may realize after signing the listing agreement that the property is worth more than agreed to in the listing agreement. Unfortunately, once the agreement is signed, if the broker brings an offer for that price, the seller may have to pay the commission even if the offer is rejected.

The attorney also should advise the client that if an offer is prepared by the broker, it should include all the conditions that appear in the listing agreement. Conditions not transferred to the sales contract may be lost.

Finally, the attorney should consider expanding the broker's duties. Listing agreements generally are vague or silent about the broker's specific responsibilities. The seller would be wise to indicate expressly in the agreement the level of sales and advertising efforts the broker is required to deliver. If the seller subsequently becomes dissatisfied with the real estate agent and early termination of the agreement is necessary, the seller will have something concrete in the listing agreement upon which to rely.

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[79] *See* Taylor v. Weingart, 693 P.2d 1231 (Mont. 1984).

[80] When negotiating with the broker concerning who should bear the loss if the buyer defaults before closing, there is authority in some jurisdictions that the buyer who signs a contract for sale and later defaults can be held liable to the broker for the lost commission. Clark v. Wright, 699 S.W.2d 174 (Tenn. Ct. **App.** 1985). **A** term imposing liability for the commission on the buyer in the case of a default by the buyer can be placed in the contract for sale. Salmon v. Hodges, 398 So. 2d 548 (La. Ct. **App.** 1979). The seller should request such a term and use the availability of shifting the risk to the buyer as a reason why the seller should not bear the risk.

IV. CONCLUSION

This article has discussed some of the law concerning when a broker can demand a commission from a seller of property. The commission obviously is earned when the broker finds a buyer within the period of the listing and the property is sold. When the property is not sold, or when the seller rejects an offer, the question of whether the seller is liable to pay a commission is more difficult. While some variance exists between jurisdictions, the trend is that the commission is earned only when title passes, unless failure of the transaction was because of the fault or bad faith of the seller. While many jurisdictions do not indicate that this is the rule, frequently this is the result achieved through various doctrines used by the courts to avoid imposing liability on a seller for a real estate agent's commission when the failure of the transaction was not the seller's fault. Though the law has treated sellers fairly, the numerous cases litigating brokers' commissions are evidence that the law is not clear, and that the agreements are not drafted adequately to avoid misunderstanding and clearly allocate the risks. Attorneys schooled in this subject can benefit their clients by carefully reviewing and drafting listing agreements.

DEDUCTING EMPLOYEE BUSINESS EXPENSES

by Major Vance M. Forrester*

I. INTRODUCTION

A. SCOPE OF ARTICLE

Military personnel often incur out-of-pocket expenses in the performance of their official duties. This article will discuss the circumstances under which these expenses may be claimed as itemized deductions on federal income tax returns. The article will address the peculiar issues likely to confront military taxpayers and will highlight several problem areas unique to this category of taxpayers.

B. BASIC STATUTORY AUTHORITY AND LIMITATIONS

No specific statutory authority exists for the deduction of the employee expenses that will be discussed in this article. Several statutory provisions, however, provide the authority for, and limitations on, deductions from gross income. Deductible business expenses may be grouped into several categories: 1)travel expenses away from home; 2) local transportation expenses; 3) meal and entertainment expenses; and 4) several miscellaneous expenses. Military personnel generally may deduct these expenses arising out of official duties if they have not been reimbursed for the expenses by the military.

The basic code section governing employee business expense deductions is Internal Revenue Code (IRC) section 162(a). This section authorizes a deduction from gross income for expenses incurred if these costs are ordinary, necessary, reasonable in amount, and

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directly related to the taxpayer's trade or business.' Conversely, IRC section 262 provides that a taxpayer may not deduct the costs incurred for personal, living, or family purposes.

The Internal Revenue Service (IRS) and the courts have struggled to define when expenses are not personal in nature and are connected sufficiently to a trade or business to be deductible. In this struggle, the focus always has been on the particular facts and circumstances of each case.

An "ordinary" expense is one that is customary or usual. This does not mean customary or usual within the taxpayer's experience, but customary or usual within the experience of the particular trade or industry involved. As a result, the expense may be "ordinary" the first time it is incurred by the taxpayer.[2]

An expense is "necessary" when it is "appropriate" or "helpful" rather than essential to the taxpayer's business.[3] Ordinarily, the taxpayer'sjudgment of what is necessary will be accepted by the courts.[4]

Courts generally have held that a taxpayer should not be penalized for business ingenuity when the expense is new or unusual in the industry.5 Further, merely because the expense turned out to be unwise does not necessarily mean the expense is not deductible.[6]

A legal obligation to make an expenditure is not a prerequisite for deducting it as a business expense.[7] On the other hand, a legal obligation to pay does not necessarily establish deductibility.[8]

Payments made by one person on behalf of another who thereafter reimburses him or her are not deductible by the person who makes the initial payment, but rather by the person on whose behalf they are made.[9] Courts have added a requirement not found in the Code—that the expenses be reasonable in amount, in addition to being ordinary and necessary.[10]

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[1]I.R.C. § 162(a) (West Supp. 1990).
[2]Welch v. Helvering, 290 U.S. 111 (1938).
[3]Blackmer v. Commissioner, 70 F.2d *255* (2d Cir. 1934).
[4]*Welch*, 290 U.S. 111.
[5]Poletti **v.** Commissioner, 330 F.2d 818 (8th Cir. 1964).
[6]Fumigators, Inc. v. Commissioner, 31 T.C.M. (CCH) 29 (1972).
[7]Warina Prods. Corp. v. Commissioner, 27 T.C. 921(A) (1957).
*Interstate Transit Lines **v.** Commissioner, 319 U.S. 590 (1943).
[9]Cochrane v. Commissioner, 23 **B.T.A.** 202 (1931).
"'United States v. Haskel Eng'g & Supply Co., 380 F.2d 786 (9th Cir. 1967)

Code section 212 is the third Code section that was enacted as part of the 1954 Code to provide taxpayers with a deduction for expenses incurred in connection with the production of income. Several years later, Code section 274 was enacted to deal directly with entertainment expenses. Entertainment expenses are in many ways the most troublesome type of trade or business expenses because of their somewhat personal nature. Section 274 requires that these expenses be either "directly related" to or "associated with" the taxpayer's trade, business, or income-producing activity. Section 274 also imposes strict substantiation requirements on the deductibility of these expenses. The taxpayer must prove the nature and relationship of these expenses to the trade, business, or income-producing activity.

Expenses incurred in connection with an individual taxpayer's trade or business are defined by the 1986 Tax Reform Act as "itemized deductions" by IRC section 63(d). Therefore, the taxpayer must itemize deductions to receive a tax benefit for these expenses. Further, these deductions fall into the category of expenses that are subject to the two-percent adjusted gross income (AGI) limitation of IRC section 67(b). Thus, all the expenses discussed in this article must exceed, in the aggregate, two percent of the taxpayer's adjusted gross income before any deduction can be taken. All of the expenses are added up and then two percent of adjusted gross income is subtracted, leaving the deductible amount.

C. TYPES OF EXPENSES

Travel expenses while away from home are deductible pursuant to IRC section 162(a)(2) if they are not reimbursed by the employer or any other source and are incurred in connection with employment, trade, or business. They include, but are not limited to the following: lodging; travel, such as plane, train, rental car, bus, and cab fares; meals; laundry; telephone/telegraph; baggage charges; tips; parking fees and tolls; and car expenses.

In general local transportation expenses in connection with employment or a trade or business are deductible. Again, these are deductible only if they are not reimbursed.

Nonextravagant meal or entertainment expenses incurred in connection with work are deductible, as are miscellaneous expenses such as education expenses, professional fees or publications, expenses incurred while seeking employment, and uniforms or equipment required by the job.

Each of the categories of expenses will be discussed in more detail below.

11. TRAVEL EXPENSES AWAY FROM HOME

A. GENERAL RULES

Generally, unreimbursed away-from-home travel expenses may qualify as deductible business or nonbusiness expenses. Travel for personal reasons is not deductible. The expenses cannot be lavish or extravagant, and only eighty percent of the cost of meals consumed on the business trip is deductible. These expenses are deductible if reasonable, necessary, and incurred by the taxpayer for the purpose of producing or collecting income, or managing property held for that purpose. Deductibility of the travel expense is not dependent on making a profit from the activity."

Travel expenses, such as meals and lodging, that are incurred ***away from home*** in pursuit of business or duty are deductible. Remember, however, that these expenses are not deductible unless the taxpayer is truly "away from home." For example, the cost of lunch at work is not deductible because the taxpayer is not "away from home."

Taxpayers are considered "away from home" if duties require them to be away from the general area of home for a period substantially longer than an ordinary day's work and if during time off while away they need to sleep or rest to meet the demands of work.[12] This has been referred to inappropriately as the "overnight" rule. The taxpayer does not have to be away from the tax home for a whole day or even overnight, as long as the rest time is sufficient to obtain necessary rest or sleep.[13] The absence from the tax home must be of sufficient duration that the taxpayer cannot reasonably leave and return to that location before and after each day's work. Napping for short periods in an automobile will not be sufficient to meet this test.[14] The location of a taxpayer's "home" is very important in determining deductibility because only expenses incurred away from that place are deductible. The rule always has been that "home" for tax purposes is the place of business, employment, station, or post of duty, even though the family residence is located in a different place.[15]

[11]Kluckhohn v. Commissioner, 18 T.C. 892(A) (1952); I.R.C. § 274(n)(1) (West Supp. 1990).
[12]United States v. Correl, 389 U.S. 299 (1966).
[13]Johnson v. Commissioner, 2 T.C. Memo (P.H.) 82,002 (1982).
[14]Barry v. Commissioner, 435 F.2d 1290 (1st Cir. 1970).
[15]Commissioner v. Flowers, 326 U.S. 465 (1946).

The travel expenses must be incurred as a result of business necessity, not personal convenience, to be deductible.[16] For example, assume a taxpayer lives with his family in Manassas, Virginia, but he works during the week at The Judge Advocate General's (JAG) School in Charlottesville, Virginia. During the week he stays at the JAG School in the bachelor officer's quarters (BOQ). On weekends, he travels to Manassas to be with his family. He cannot deduct any of his expenses for travel, meals, or lodging in Charlottesville because that is his tax home. Moreover, he cannot deduct the travel, meals, or lodging in Manassas because he goes there on personal business.

A taxpayer with two or more businesses can deduct the costs of travel between businesses, but not the commuting costs from his residence to one business.[17] For example, a noncommissioned officer working for the government at an Army post and as a bartender off-post may deduct the cost of traveling from the installation to the bartender job, but not the cost of traveling from home to the post.

If a shift in job post or business location is "temporary," the tax home does not shift to the new location, thereby allowing the taxpayer to deduct the travel costs at the new place.[18] If a taxpayer shifts his or her job post or business location for an "indefinite" period, however, the tax home also moves, and the taxpayer cannot deduct traveling and living costs at the new location.[19] A shift of job post or business location is "indefinite" if its termination cannot be foreseen within a fixed and reasonably short time. Employment that lasts more than one year will be presumed indefinite unless the taxpayer can demonstrate to IRS that he or she realistically expected the employment to last less than two years. A job of two years or more will be considered an indefinite stay.[20]

A nonresident alien cannot deduct the cost of living expenses incurred while permanently employed in the United States.[21] Keep in mind that a nonresident alien is taxed under special rules—usually at a flat rate of thirty percent, on source income from the United States.[22]

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[16]Thompson v. Commissioner, 6 T.C. 285, *aff'd*, 161 F.2d 185 (2d Cir. 1946)
[17]Rev. Rul. 54-497, 1954-2 C.B. 75.
[18]Noneman v. Commissioner, 40 T.C.M. (CCH) 99 (1980).
[19]Riley v. Commissioner, T.C. Memo 1957-117.
[20]Rev. Rul. 83-82, 1983-1 C.B. 45.
[21]Carranza v. Commissioner, 11 T.C. 224 (1948).
[22]I.R.C. § 871(a) (West Supp. 1990).

"Home" for military taxpayers is the principal post of duty.[23] The tax home for service members stationed overseas or assigned to permanent duty on a ship is the overseas post or the ship.[24]

B. LAVISH EXPENDITURES

IRC section 162(a)(2) specifically precludes deduction of "lavish or extravagant" travel expenses. Very little guidance exists concerning what constitutes lavish or extravagant expenses. While lavish or extravagant is something unreasonable, no objective test or fixed dollar amount is provided in the Code.[25] No reported cases or rulings have denied a deduction because it was considered a lavish or extravagant expense.

C. PARTLY BUSINESS AND PARTLY PERSONAL

For travel within the United States, when a taxpayer incurs travel expenses that are, in part, attributable to business matters and, in part, to personal purposes, deductibility will depend on whether the travel was undertaken primarily for business or primarily for personal reasons. If the trip is primarily for business, the cost of traveling to and from the business destination is fully deductible.[26] Meals and lodging and other expenses while at the destination are deductible to the extent allocable to business purposes, but not deductible to the extent allocable to personal purposes. If the travel is undertaken primarily for personal purposes, no part of the travel costs to and from the destination is deductible. Meals, lodging, and other expenses, however, still may be deducted to the extent directly related to a business purpose.[27] Whether a trip is primarily business or primarily personal is a question of fact. Although no objective standard is set forth in the Code, the time spent on business or personal activities will be a very important consideration.[28]

The rules are different for travel outside the United States for periods exceeding one week. The general rule is that no deduction

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[23]Bercaw v. Commissioner, 6 T.C. Memo 27, *aff'd*, 165 F.2d 521 (4th Cir. 1948).
[24]Rev. Rul. 67-438 1967-2, C.B. 82; Commissioner v. Stidger, 386 U.S. 287 (1967).
[25]Rev. Rul. 63-144, 1963-2 C.B. 129.
[26]Treas. Reg. § 1.162-2(b) (1960).
[27]*Id.* § 1.162-2(b).
[28]Treas. Reg. §§ 1.162-1, 2(b) (1975).

is allowed for expenses of travel outside the United States that are not allocable to business purposes. If the travel is for one week or less, the same rules apply as for travel in the United States.[29] A week means seven consecutive days, excluding the departure day but including the return day. The general rule does not apply, even if the trip exceeds one week, unless the portion of time away from home allocable to personal activities is twenty-five percent or more of the total time away from home. For this purpose, both the departure and return days are included.[30] Again, if the personal allocation does not exceed twenty-five percent, the same rule applies as travel in the United States. For example, assume the spouse of a service member has unreimbursed travel expenses associated with a business convention in France. The spouse travels from the United States to France by plane, spends five days at the convention, and then spends three days touring France before returning home by plane. The total time away from home is nine days—clearly more than one week. Further, the time allocated to personal activities (three days out of nine) is more than twenty-five percent. Therefore, the general rule applies, and only expenses actually allocable to business are deductible.

Generally, the allocation between business and personal time must be made on a day-by-day basis unless the taxpayer can demonstrate a different method of allocation that more clearly reflects the time allocation.[31] Business days are days in which, during normal hours, the principal activity is pursuit of business. "Business days" include travel days to and from destinations; days the taxpayer cannot conduct business due to circumstances beyond the taxpayer's control; business meeting days; and weekends, holidays, and standby days. Standby days are not included, however, if they come at the end of the trip.[32]

The expenses of a taxpayer's spouse or other family members accompanying the taxpayer on the trip generally are not deductible unless the taxpayer can demonstrate that the presence of the family member is for a bona fide business purpose. The performance of some incidental service does not make the expenses deductible. The test of deductibility for a spouse or other family member is necessity, not convenience or helpfulness.[33]

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[29]Treas. Reg. § 1.274-4(c) (1964).
[30]*Id.* § 1.274-4(c), (d).
[31]*Id.* § 1.274-4(d)(2).
[32]*Id.* § 1.274-4(d)(2).
[33]Johnson v. Commissioner, T.C. Memo 1966-164.

III. LOCAL TRANSPORTATION EXPENSES

A. GENERAL RULES

Local transportation expenses, including the cost of operating and maintaining a car, that are directly attributable to the conduct of a trade or business, are deductible by employees and self-employed persons. These expenses are deductible even if not incurred away from home.[34] Deductible transportation expenses include the costs of air, bus, train, taxi, and car, but not meals and lodging.

Automobile expenses allocable to business purposes are deductible by the taxpayer, who may elect to deduct either the actual costs of such items as gas, oil, maintenance, tires, tolls, insurance, licensing and depreciation, or the standard mileage rate. The standard mileage rate for 1990 is twenty-six cents-per-mile with no reduction for mileage over 15,000 miles.[35]

B. STANDARD REIMBURSEMENTS AND PER DIEM

Reimbursements from an employer must be subtracted from deductible expenses. Taxpayers also must substantiate reimbursements before claiming a deduction. Generally, these expenses will be deemed substantiated when the employer reimburses the employee with a mileage allowance using a flat rate or stated schedule that combines periodic fixed and variable payments (FAVR).[36] This system simplifies the employee's burden of recordkeeping and shifts the burden to the employer to keep records.

Many employers have a reimbursement procedure for the expenses of their employees. The IRS encourages employers to exercise controls over the amounts paid to ensure that only ordinary and necessary business expenses are paid. One control often used is to examine employee's expense accounts by an auditor or another person responsible to the employer and approve only expenses that are ordinary and necessary. The person incurring the expense cannot also be the auditor.[37] The regulations authorize the IRS to prescribe

[34] Treas. Reg. § 1.162-1(a) (1975).
[35] Rev. Proc. 89-66, 1989-52 I.R.B. 13.
[36] Rev. Proc. 90-34, 1990-26 I.R.B. 13.
[37] Treas. Reg. § 1.274-5(e)(5) (1985).

rules under which the adequate records requirements and the adequate accounting requirements will be deemed satisfied with respect to the amount of ordinary and necessary expenses under standard reimbursement arrangements and per diem allowances.[38] If an employer pays a per diem allowance in lieu of reimbursing actual expenses for lodging, meal, and incidental expenses by an employee, the amount of the expenses that is deemed substantiated is the lesser of the per diem allowance or the amount computed at the federal per diem rate for the locality or travel for the period the employee is away from home.[39]

C. COMMUTING EXPENSES

The cost of commuting between a residence and place of employment or business is not deductible.[40] The lack of public transportation is irrelevant,[41] as is the lack of nearby housing.[42] Moreover, commuting expenses are not deductible, even if the distance of the commute is long (as much as seventy-five miles from home to business).[43] Employees working at two places in one day, whether or not for the same employer, may deduct the expense of getting from one place to the other.[44] Taxpayer-employees commuting from home directly to the second business, however, may deduct only the cost of mileage from the first place of business to the second place of business.

A reservist serving on temporary active duty who has a regular place of employment to which he will return when the tour of service is over is in a 'travel status." Unreimbursed travel, lodging, or meal expenses incurred at the temporary military post are deductible. The focus is on the duration of the temporary duty, without regard to its location in relation to the regular place of employment. In general, if a member has a regular place of employment, transportation expenses incurred going to and from a temporary duty site are deductible. A temporary duty site is one of an irregular or short term. Short term means a duration of days or weeks, not months. Thus, if the Reserve duty is of a continuous period of months, the transportation expenses are construed to be nondeductible commuting expenses.[45]

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[38] *Id.* § 1.274-5(f).
[39] Rev. Proc. 89-67, 1989-52 I.R.B. 17.
[40] Treas. Reg. § 1.162-2(e) (1960).
[41] Cashman v. Commissioner, 9 T.C. 761 (1947).
[42] Daniels v. Commissioner, 16 T.C.M. (CCH) 944 (1957).
[43] Verner v. Commissioner, 39 T.C. 749 (1963).
[44] Rev. Rul. 55-109, 1955-1 C.B. 261.
[45] Rev. Rul. 90-23, 1990-1 C.B. 4.

IV. MEAL AND ENTERTAINMENT EXPENSE

A. DIRECTLY RELATED TO OR ASSOCIATED WITH REQUIREMENT

For years, taxpayers were able to claim their business expenses as "ordinary" and "necessary" without substantiation. In response to what was considered a source of abuse by taxpayers, in 1962 Congress added section 274 to limit meal and entertainment expenses. Essentially, section 274 requires that, to be deductible, entertainment expenses must be either "directly related to" or "associated with" the taxpayer's trade, business or income-producing activity. Additionally, this section imposes strict substantiation requirements on the taxpayer and overrules a prior case that allowed courts to estimate expenses when taxpayers could not prove the exact amount of expenses.[46] The uncorroborated testimony of taxpayers is now insufficient to establish deductibility of entertainment expenses. Rather, to be deductible, the taxpayer must maintain either adequate records or other sufficient evidence of expenses incurred concerning the amount, time and place, business purpose, and business relationship of the taxpayer and persons entertained.[47]

Specifically, the taxpayer must be able to show that the entertainment expenses were either related directly to the conduct of a trade or business, or directly preceded or followed a substantial bona fide business discussion that was associated with the active conduct of a trade or business or income-producing activity.[48] Only the expenses "directly related to" or "associated with" the trade, business or income-producing activity are deductible. All other expenses are not deductible.

The "directly related" test under section 274(a)(1)(A) and Treasury Regulation 1.274-2(c) can be met under either the "active business discussion" test or the "clear business setting" test contained in Treas. Reg. 1.274-2(c). Pursuant to the "active business discussion" test, the taxpayer must have had more than a general expectation of deriving income or other business benefit when incurring the expense; goodwill alone is not sufficient. Basically, taxpayers must show that they actually engaged in business discussions and that the prin-

[46]Cohan v. Commissioner, 39 F.2d 540 (*Bd* Cir. 1930).
[47]I.R.C. § 274(d) (West Supp. 1990).
[48]Treas. Reg. § 1.274-2(a) (1985).

cipal character of the combined business and entertainment was the active conduct of trade or business. No requirement exists that more time be spent on business than on entertainment; the only requirement is that business matters were not merely incidental.

Under the "clear business setting" test, the taxpayer must show either that the person entertained reasonably would have known that the taxpayer had no significant motive other than directly furthering his trade or business, or that no significant personal or social relationship existed between the taxpayer and the persons entertained. The IRS will consider all of the facts and circumstances to determine if the "clear business setting" test has been met. This test is difficult to meet if the taxpayer was not present. Moreover, substantial distractions at events, such as night clubs, theaters, sporting events, or social gatherings will make it difficult to establish a clear business setting. Finally, the location of the meeting at places where other than business associates are present—such as lounges, country clubs, athletic clubs, or vacation resorts—will limit the ability to claim deductions.[49]

The "associated with' test under section 274(a)(1)(A) and Treasury Regulation 1.274-2(d) is a less stringent test than the "directly related to" test. Congress recognized that actual business need not be conducted or even discussed during the entertainment.[50] This test allows for promotion of goodwill to obtain new business or continue an existing relationship as a sufficient business motivation to claim deductions. Clearly, however, entertainment not preceded or followed by some form of business discussion or activity is not deductible.[51]

B. OTHER GENERAL RULES

In the 1986 Tax Reform Act, Congress amended IRC section 274 and imposed a percentage limitation of eighty percent of the cost of meal or entertainment expenses.[52] This limitation applies specifically to any expense for food or beverage and to any item generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used for such activity.[53] Because determining just what part of these expenses are personal in nature in

[49] *Id.* § 1.274-2(c)(7).
[50] S. **Rep. No. 1881-2, 26 (1962).**
[51] Treas. **Reg.** § 1.274-2(d)(3) **(1985).**
[52] I.R.C. § 274(n) **(West Supp. 1990).**
[53] *Id.* § 274(n)(1).

any given case is very difficult, Congress merely imposed the eighty-percent limitation across-the-board. Thus, twenty percent of all meal and entertainment expenses are nondeductible personal expenses.

In determining the amount that is subject to the eighty-percent limitation, taxes and tips relating to meals and entertainment are included.[54] Likewise, expenses such as cover charges for admission to night clubs and parking at sports arenas are included in the limitation.[55] Transportation to the event is not subject to the limitation.[56]

The eighty-percent rule is applied to "allowable" expenses. Thus, the first step is to determine if the expense is allowable; this should be done before applying the eighty-percent limitation. For example, the deduction for tickets to an entertainment event cannot exceed the face amount of the ticket plus tax paid on the ticket.[57]

Nine exceptions exist to the rule limiting meal and entertainment deductions to eighty percent of the cost. These exceptions also are exceptions to the general requirement that the expenses be "directly related to" or "associated with' the trade, business or income-producing activity. Some of these exceptions are contained in IRC section 274(e)(2), (3), (4), (7), (8), and (9). These are generally only deductible by the employer and include the following: compensation to an employee that is included in the gross income of that employee; traditional recreational expenses for employees; services or facilities that are made available by the taxpayer to the general public, entertainment goods or services that are sold by the taxpayer in a bona fide transaction; food or beverage expenses that are excludable from the gross income of the recipient under the de minimus fringe benefit rules of IRC section 132; and tickets to a tax exempt charitable organization event.[58]

Entertaining is not limited to a commercial establishment. The entertaining can take place at the taxpayer's home as long as the entertainment is for a business and not a personal purpose.[59] Taxpayers who entertain when they are not traveling away from home cannot deduct that portion of meals or entertainment equal to what they ordinarily would have spent for the meal or activity.[60] Finally,

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[54]Internal Revenue Service Pub. 17, at 143 (1990).
[55]*Id.*
[56]*Id.*
[57]I.R.C. § 274(l)(1)(A) (West Supp. 1990).
[58]*Id.* § 274(e).
[59]Ryman, Jr. v. Commissioner, 51 T.C. 799 (1969).
[60]Sutter v. Commissioner, 21 T.C. 170(A) (1953).

meal and entertainment expenses will be disallowed to the extent they are lavish or extravagant.[61]

C. ENTERTAINMENT FACILITIES

Social clubs often represent a source of valuable business contacts. Nevertheless, dues paid to a club used solely for social purposes are not business expenses.[62] The cost of membership in officers' or noncommissioned officers' clubs are not deductible. If a social club is used primarily for the furtherance of a taxpayer's trade or business, then that portion of the dues for the year allocable to entertainment that is related directly to the active conduct of his trade or business is deductible.[63]

The Code generally disallows deductions for amounts paid or incurred in connection with an "entertainment facility." Generally, an entertainment "facility" is any item of personal or real property owned, rented, or used by a taxpayer. An "entertainment facility" is one used in connection with an activity that is of a type generally considered to constitute entertainment, amusement, or recreation. Thus, expenses incurred in connection with entertaining on yachts, at hunting lodges, fishing camps, swimming pools, tennis courts, and bowling alleys have been disallowed.[64] F'acilities used incidentally for entertainment, if that use is only insubstantial, will not be considered a "facility used in connection with entertainment.''[65]

D. MILITARY RULES FOR DEDUCTING ENTERTAINMENT EXPENSES

The IRS has ruled two times since the enactment of IRC section 274 on the deductibility of entertainment expenses for military personnel.[66] Both cases held that as long as the military taxpayer complies with the reporting, recordkeeping, and substantiation requirements of the Code, the expenses will be deductible. By implication, the rulings support the conclusion that military officers are engaged in a trade or business. Also, the rulings recognize that certain military officers incur deductible entertainment expenses as part of their official duties.

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[61]Treas. Reg. § 1.274-1 (1963).
[62]Miller v. Commissioner, 39 T.C. 940 (1964).
[63]Treas. Reg. § 1.274-2(a) (1985).
[64]*Id.* § 1.274-2(e)(2).
[65]*Id.*
[66]Rev. Rul. 77-351, 1977-2 C.B. 23; Rev. Rul. 77-350, 1977-2 C.B. 21.

One potential pitfall for military members is proving that entertainment expenses are necessary to perform their duties. Military members ordinarily will not have written orders or requirements to entertain. Few cases exist that are on point, but four reported cases demonstrate that military members must prove necessity. A member may show, however, that failure to entertain would result in some detriment to career or position. In *Pollock v. Commissioner*,[67] for example, the military governor of American Samoa was able to demonstrate a connection between official duties and entertainment. In two other cases, the taxpayers, who represented themselves pro se, were not able to prove this connection. In *H.B. McNary*[68] a civilian employee of the United States military government established in Germany shortly after World War II was not entitled to deduct certain entertainment expenses. The evidence consisted solely of the taxpayer's testimony and did not specify the nature or amount of the expenses, much less any connection with performance of official duties. In *William T. Preston*[69] the taxpayer, an Air Force colonel and hospital commander, sought to deduct officer club dues, nursery expenses, base and wing social events, and expenses of entertaining civilian physicians. The taxpayer did not introduce evidence of the necessity of entertaining, even though the court noted that books were available that gave guidance on entertaining and attending social functions. The taxpayer did not even introduce his own understanding of the customs of the Air Force in this regard. The court held that insufficient evidence was presented to justify deducting the expenses. In ***Fogg*** v. *Commissioner*[70] a Marine colonel claimed expenses for the costs of entertainment in connection with a change-of-command ceremony. The IRS contested the claim, and the Tax Court ultimately allowed the expenses. It was stipulated that the ceremony was part of the custom and tradition of the Marine Corps. Colonel Fogg also introduced evidence of a memorandum that said that certain entertaining was required from time to time and a change of command ceremony was listed as such a type of entertaining, even though no government funds were available for reimbursement. The court recognized that a military officer is engaged in a trade or business and that the expenses were ordinary and necessary.[71] The court noted that for the expenses to be "necessary," they might have to be required by the employer without reimburse-

[67] Pollock v. Commissioner, 10 B.T.A. 1297 (1928)
[68] 11 T.C.M. (CCH) 692 (1952).
[69] 20 T.C.M. (CCH) 1304 (1961).
[70] 89 T.C. 27 (1987).
[71] *Id.*

ment.[72] In this case, the court found that Colonel Fogg proved that the change of command expenses were required by the employer.[73]

The trend is to allow military officers to deduct entertainment expenses. While courts seem willing to accept the proposition that entertainment can be required, taxpayers must be prepared to present evidence establishing that the costs for any event were ordinary and necessary.

High ranking flag officers (three and four star officers) receive a personal money allowance each year so they can entertain in accordance with the customs of the service. This allowance is included in the gross income of the flag officer and reported to the officer on a W-2 form by the finance and accounting office servicing that officer at the end of the year. The allowance is a flat fee reimbursement, and flag officers are not required to account to the department involved for expenses incurred during the year. The officer must itemize deductions on Schedule A of Form 1040 and Form 2106 to deduct that portion of entertainment expenses that exceed two percent of his or her adjusted gross income for the year.

V. MISCELLANEOUS EMPLOYEE BUSINESS EXPENSES

A. MILITARY UNIFORMS, INSIGNIA, AND EQUIPMENT

A member of the armed forces generally cannot deduct the cost and upkeep of uniforms. These costs are not deductible because the uniforms are personal property and take the place of civilian clothes.[74] The cost of any article or equipment of an officer or enlisted member that is required by the profession and does not take the place of an article required in civilian life is deductible to the extent that it exceeds the nontaxable allowances. For example, the cost of purchasing rank insignia, ribbons, and awards would be deductible.[75]

Reservists and National Guardsmen may deduct the cost of purchasing and maintaining uniforms that can be worn only on active

[72] *Id.*
[73] *Id.*
[74] *Bercaw*, 6 T.C. Memo 27, *aff'd*, 165 F.2d 521 (4th Cir. 1948); Treas. Reg. § 1.262-1(b)(8).
[75] Treas. Reg. § 1.162-1(b)(8) (1975).

duty for training for temporary periods when attending service schools.[76] Active duty members may deduct the cost and maintenance of military fatigue uniforms if the uniform is required to be worn as part of military duties, and if military regulations prohibit the wearing of the fatigue uniform except while on duty or while traveling to and from work.[77] In other words, the uniform cannot take the place of civilian clothes but must be worn on duty to be deductible. If the uniform can be worn off duty, the costs of purchasing and maintaining the uniform are not deductible. The requirement to wear only the fatigue uniform on duty may be established by local regulation. Likewise, the prohibition against wearing the fatigue uniform off duty could be established by regulation or by treaty.

B. EDUCATION EXPENSES

Unreimbursed education expenses for tuition, fees, books, and travel and transportation associated with education are deductible if they are required to maintain or improve skills for the job, or to keep a job or maintain a level of pay in the job.[78] Expenses meeting either test are deductible even though they lead to a degree.[79] The expenses are not deductible merely because promotion would be more difficult without a degree.[80] The deduction for otherwise allowable education expenses must be reduced by any scholarship payments received that are tax-exempt.[81] This would include tax-exempt education assistance payments received from the Department of Veterans' Affairs (VA) under 38 U.S.C. section 1681.[82] In this regard, fifty percent of section 1681 reimbursements are allocable to education expenses, and the other fifty percent are personal living expenses.[83] For example, assume a veteran has deductible education expenses for tuition, books, and similar expenses of $1000 for the current year and receives $780 as an educational assistance allowance from the VA. Under the VA program, half of the payment is for living expenses and half for education expenses. The taxpayer may deduct $610, computed as follows:[84]

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[76]Rev. Rul. 55-109, 1955-1 C.B. 261; Treas. Reg. § 1.262-1 (1960)
[77]Rev. Rul. 67-115, 1967-1 C.B. 30.
[78]Treas. Reg. § 1.162-5(a) (1967).
[79]*Id.* § 1.162-5(a).
[80]Joyce v. Commissioner, 28 T.C.M. (CCH) 914 (1969).
[81]Christian v. United States, 201 F. Supp. 155 (D.C. 1962).
[82]Rev. Rul. 83-3, 1983-1 C.B. 72.
[83]*Id.*
[84]*Id.*

$1000 total allowable expenses less **$390** (one half of $780 reimbursed expenses).

When only a part of the expenses qualify for deduction, the portion of the reimbursement that is deductible is determined by multiplying the deductible education expense amount by a fraction; the numerator of the fraction is the amount of the reimbursement allocable to education expense and the denominator is the total education expense. This product is subtracted from the otherwise deductible education expenses to arrive at the deduction amount. For example, assume a veteran has education expenses of $1500, of which $1000 are otherwise deductible. The veteran receives $780 as an educational assistance allowance from the VA, half of which is allocable to education expenses and the other half is for living expenses. The veteran may deduct $740 of the otherwise deductible expenses ($1000 less $260, which is determined by multiplying $1000 x $390/$1500).

Educational expenses are not deductible—even if the education is required to maintain or improve skills required by the taxpayer's employment or is required to keep the job—if the education either qualifies the taxpayer for a new trade or business, or is required to meet the minimum educational requirements for the job.[85] For example, assume a soldier's specialty is infantry. The costs of going to college part-time to earn a degree in accounting are not required to keep the job or maintain a level of pay in the job, so they would not be deductible. On the other hand, an employee in the bookkeeping department of a department store who is required to have an accounting degree to keep the job could deduct the costs of going to college to get an accounting degree, but could not deduct the additional costs of obtaining a Masters of Business Administration (MBA) because this would qualify the employee for a new trade or business.

Educational expenses are deductible only if the taxpayer is an employee or self-employed in a trade, business, or profession.[86] Therefore, if a taxpayer ceases to engage in a particular employment and then goes to school while planning to resume his or her employment or trade, the expenses will not be deductible.[87] A taxpayer who leaves a position to pursue a course of education and incurs otherwise deductible expenses, however, may claim the deduction if the absence

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[85]Treas. Reg. § 1.162-5(b)(2) or *(3)* (1967).
[86]*Id.* § 1.162-5(b).
[87]Rev. Rul. 60-97, 1960-1 C.B. 69.

is only "temporary."[88] Ordinarily, an absence of more than one year would not be temporary.[89]

The education expenses must have a direct and proximate relationship to the job skills required on the job to meet the "maintain or improve business or professional skills" test.[90] For example, expenses for courses in business administration taken by military personnel to improve skills in a position that principally involves command and administration of personnel are deductible.[91] Conversely, expenses incurred by an Army defense lawyer taking English literature classes are not deductible.[92]

Education expenses incurred to become a specialist within the taxpayer's trade or profession are generally deductible even if the education leads to an advanced degree, such as a masters of law.[93] If the courses qualify the taxpayer for a new trade or business—such as a nonlawyer, engaged in a trade other than law, going to law school to get a law degree—the expenses will not be deductible.[94]

C. EXPENSES OF SEEKING EMPLOYMENT

Expenses incurred seeking employment in the same trade or business generally are deductible. They are not deductible, however, if the taxpayer is seeking employment in a new trade or business.[95] If a presently unemployed individual is seeking a job, his or her trade or business consists of the services previously performed. If no substantial lack of continuity exists between the time of the past employment and the seeking of new employment, the expenses of seeking the new job are deductible.[96] For example, a taxpayer who was engaged in the full-time practice of law and was a part-time lecturer at a law school was allowed deductions in connection with seeking new employment because he eventually was hired as a full-time assistant professor at a new law school. The IRS held that he originally was engaged in two businesses and the full-time job as an assistant professor did not involve tasks or activities substantially dif-

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[88]Rev. Rul. 68-591, 1968-2 C.B. 73.
[89]*Id.*
[90]Boser v. Commissioner, 77 T.C. 1124(A) (1981).
[91]Rev. Rul. 69-199, 1969-1 C.B. 51.
[92]McAuliffe v. Commissioner, 40 T.C.M. (CCH) 420 (1980)
[93]Treas. Reg. § 1.162-5(b)(3) (1967).
[94]Johnson v. Commissioner, T.C. Memo 257 (1978).
[95]*Id.*
[96]Rev. Rul. 75-120, 1975-1 C.B. 55.

ferent than those performed as a part-time lecturer.[97] The deduction of job-seeking expenses was denied, however, for a retired Air Force officer who had performed unique duties in the military.[98]

D. PROFESSIONAL BOOKS, DUES, FEES, ETC.

The costs of professional or specialized publications, books, or equipment needed in the job to help maintain or improve job skills are deductible. Likewise, professional fees or dues are deductible if the taxpayer is engaged in the profession represented by that organization.[99] For example, doctors and lawyers working for the Armed Forces may deduct professional dues paid to organizations such as the American Medical Association or the American Bar Association.

VI. SUBSTANTIATION

A. GENERALLY

Taxpayers have the burden of substantiating deductions for business and nonbusiness expenses by adequate records or by sufficient evidence corroborating the taxpayer's own statement. As previously noted, accurate records are required to meet the demanding requirements of section 274 for meal and entertainment expenses. Records must be kept for all types of expenses, however, because the burden of proof always is on the taxpayer to substantiate a deduction.[100]

B. LOCAL TRANSPORTATION

Taxpayers must be prepared to substantiate all of the following elements with respect to each expenditure or use of property to claim transportation costs:

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[97] Rev. Rul. 78-93, 1978-1 C.B. 38.
[98] Evans v. Commissioner, 413 T.C.M. (P.H.) 81-413 (1981).
[99] Treas. Reg. § 1.162-6 (1960).
[100] I.R.C. § 274 (West Supp. 1990).

- The amount and date of each expenditure.
- The amount and date of each use of the property for business purposes (mileage for autos and time for other types of property>.
- The business purpose for each expenditure with respect to the property.

Taxpayers are not required to satisfy these substantiation requirements contemporaneously with the expenditures. Records made at or near the time of the expenditure, however, have a high degree of credibility.[101]

Special rules exist for employer-provided automobiles used by employees. Written policy statements of the employer barring personal use of an employer-provided vehicle qualify as sufficient evidence corroborating the taxpayer's own statement and preclude the necessity for keeping additional records.[102] These automobiles must be used only for business purposes and the vehicle must be owned or leased by the employer. The commuting value must be included in the employee's income, or the employee must reimburse the employer for the commuting value. This latter requirement may constitute a working condition fringe under section 132,[103] thus doing away with the requirement for inclusion in gross income of the employee. On Form 2106, Employee Business Expenses, the employee must provide the following information with respect to deductions for automobiles: total mileage driven; business mileage driven; commuting mileage driven; other personal mileage driven; percentage of business use; date placed in service; use of other vehicles; afterwork use; whether evidence is available to support the business use claimed on the return; and whether the evidence is written.

On the Form 2106 the taxpayer must provide information with respect to deductions for other types of property, such as date placed in service, percentage of business use, whether evidence is available to support the claimed percentage of business use, and whether the evidence is written.

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[101]Temp. Treas. **Keg.** § 1.274-5T(c)(1) (1985)
[102]*Id.* § 1.274-6T(a)(1).
[103]I.R.C. § 132 (West Supp. 1990).

C. TRAVEL FOR ENTERTAINMENT EXPENSES AND GIFTS

The elements for substantiating away-from-home travel expenses, entertainment expenses, and business gifts are the amount of the expense, the time of travel or entertainment, the place of travel or entertainment, the date of the event, the description of the gifts, the business purpose of the expense, and the relationship to the person entertained or receiving a gift.[104]

Employees and self-employed individuals away from home on business travel may use the standard per diem amounts to compute meal expense deductions instead of using records to substantiate the actual amount of the expense.[105] Failure to substantiate a particular element of travel and entertainment will not bar a deduction if the taxpayer establishes substantial compliance by proving the missing element by evidence deemed adequate.[106] Adequate records must include a written statement of the business purpose of the expenditure.[107] In *Meridian Wood Products, Co.* v. *United States*[108] the appellate court upheld a district court's holding that records were inadequate because the business purpose was not recorded. No particular form of record keeping is required, but all the elements of the listed property must be recorded. Estimates are not acceptable.[109]

The records sometimes must include documentary evidence, such as receipts to constitute "adequate records" of certain kinds of expenditures. This is true for expenditures for lodging while traveling away from home, regardless of the amount, and for any other separate expenditure of twenty-five dollars or more (except for transportation charges).[110] While oral evidence corroborating the taxpayer's own statement—such as oral testimony from a disinterested, unrelated party describing the taxpayer's activity—may be of sufficient probative value, written evidence has more probative value."[111] Every element of each separate expenditure must be substantiated, because each separate payment or use is a separate expenditure.[112]

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[104] Treas. Reg. § 1.274-5(b)(1) (1985).
[105] *Id.* § 1.274-5(h).
[106] *Id.* § 1.274-5(c)(2)(v).
[107] Meridian Wood Prod., Co., Inc. v. United States, 725 F.2d 1183 (9th Cir. 1984).
[108] *Id.*
[109] Culwell v. Coard, 67-2, U.S.T.C. para. 9508, 19 A.F.T.R.2d (1697) (1967).
[110] Treas. Reg. § 1.274-5(c)(2)(iii) (1985).
[111] Temp. Treas. Reg. § 1.274-5T(c)(1) (1984).
[112] Treas. Reg. § 1.274-5(c)(2)(iii) (1985).

Therefore, if a taxpayer entertains a guest at dinner and a night baseball game, the dinner costs and baseball costs must be recorded separately. Certain expenditures can be grouped together with underlying costs, such as meals, tips and gratuities, and traveling incidental costs.[113] Loss of records through circumstances beyond the taxpayer's control, such as fire, flood, or earthquake, may be proven through reconstruction of the expenditures.[114]

D. AWAY-FROM-HOME TRAVEL COSTS

The elements to substantiate away-from-home travel costs are the amounts of each expenditure on a daily basis, the date of departure and return for each trip, the number of days away from home spent on business, the city of destination, and the business purpose.[115]

VII. REIMBURSEMENTS

A. EFFECT OF REIMBURSEMENTS BY EMPLOYER

If the employer reimburses the expenses of the employee, the employee may be excused from keeping adequate records, assuming the reimbursements do not exceed the expenses.[116] An expense account or other reimbursement arrangement, coupled with an "adequate accounting" by the employee to his employer will excuse the employee from reporting reimbursements and deductions on the return. Also, in the case of entertainment expenses, the burden shifts to the employer to prove the deductibility of the expenses. No withholding is required by the employer because they are clearly identified by the employer as payments and not wages. No yearly information returns need to be filed by the employer for the payments.

B. PARTIAL REIMBURSEMENTS

If reimbursements do exceed expenses, the employee must include the excess in income.[117] Further, if the expenses exceed the reim-

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[113]Temp. Treas. Keg. § 1.274-5T(b) and *(c)*(1984).
[114]Treas. Reg. § 1.274-5(c)(5) (1985).
[115]*Id.* § 1.274-5(b)(2).
[116]*Id.* § 1.162-17(b)(2).
[117]I.R.C. § 61(a)(1) (West **Supp.** 1990).

bursements, the employee can take a deduction in the usual way.[118] This is so even if the reimbursement is in the form of per diem payments by the employer. The accounting to the employer must satisfy the requirements of section 274(d).[119]

VIII. RESULT OF DISALLOWANCE

If the IRS disallows the deduction, the amounts disallowed will be added to income and the tax liability will be recomputed. The statute of limitations for assessment and collection is three years after the return is filed.[120] Therefore, the taxpayer must keep accurate records for at least three years. Records should be kept for longer than that, however, because some audits extend back past three years.

IX. CONCLUSION

This article has outlined the types of expenses that an employee or self-employed person can take as itemized deductions. Many limits exist to these deductions. As a practical matter, the taxpayer's itemized deductions should exceed the standard deduction. Also, two percent of the AGI must be subtracted from all employee business expenses before any deduction can be taken. All of the substantiation requirements must be met, which means detailed and accurate records must be kept throughout the tax year. Finally, all of the requirements and limitations discussed in this article for each type of expense must be satisfied. Only then can any deduction be taken as an employee business expense.

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[118]Treas. Reg. § 1.162-17(b)(3) **(1972).**
[119]*Id.* § 1.274-5(e)(4).
[120]I.R.C. § 6501(a) **(West Supp. 1990).**

By Order of the Secretary of the Army:

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